
Is SA law and policy equipped to deal with the peculiarities of Human Trafficking?

Lorna M Houston

SUPERVISOR: Ms Salona Lutchman

MASTERS OF PHILOSOPHY IN HUMAN RIGHTS LAW DISSERTATION

PUBLIC LAW DEPARTMENT, LAW FACULTY

UNIVERSITY OF CAPE TOWN

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ABSTRACT

Tens of thousands of men, women and children are being trafficked around the world and brutally exploited. This research investigated if SA law and policy is equipped to deal with the peculiarities of Human Trafficking. This dissertation's central thesis is that the legal and policy response to human trafficking in South Africa is inadequate to deal with its peculiarities. The anti-trafficking response must extend beyond the application of human rights and criminal law to include a cross-cutting, multi-sectoral, socio-economic and political response that addresses its causes and consequences.

The study considers and explores the definition of human trafficking, its causes, consequences and the peculiarities and specificities of human trafficking in SA. The international, regional and domestic legal frameworks and their relevance for human trafficking is outlined with emphasis on the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 and the National Policy Framework.

A feminist lens using Intersectionality and Standpoint Theory, is applied to inform the critical analysis of the research question. This thesis demonstrated that South Africa's law and policy although promising, is insufficient in dealing with the peculiarities of human trafficking. The law needs to better account for the root causes of trafficking. It is essential that this response is informed by intersectionality to enable the implementation of broader solutions especially addressing the violation of social and economic rights and the root causes of trafficking.

GLOSSARY OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
CRC-OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CRPD	Convention on the Rights of Persons with Disabilities
DEVAW	Declaration on the Elimination of Violence Against Women
DG	Director-General
DHA	Department of Home Affairs
DOJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development
GCIS	Government Communication and Information System
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on The Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
NPF	Prevention and Combating of Trafficking in Persons National Policy Framework
PCTP	Prevention and Combating of Trafficking in Persons
POCA	Prevention of Organised Crime Act
SAPS	South African Police Service
SARS	South African Revenue Services
SADC	Southern African Development Community
TIP	Trafficking in Persons

UDHR	United Nations Universal Declaration of Human Rights
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
DHA	Department of Home Affairs
UNTOC	United Nations Convention against Transnational Organised Crime
WFCL	Worst Forms of Child Labour Convention

DEDICATION

DEDICATED TO MY GRANDMOTHER, WINIFRED LE SHAULS, ON WHO'S SHOULDERS I STAND, SHE WAS BROUGHT TO SOUTH AFRICA FROM THE BELGIAN CONGO AS A CHILD, SEPARATED FROM HER FAMILY, AND WORKED AS A CHILD SERVANT.

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CHAPTER 1 INTRODUCTION

Tens of thousands of men, women and children are being trafficked around the world and brutally exploited. The United Nations defines human trafficking as,

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹

The United Nations Office on Drugs and Crime (UNODC) reports that ‘63,251 victims were detected in 106 countries and territories between 2012 and 2014.’² The UNODC produces regular reports indicating the flows of trafficked persons around the world, these flows depict that this is indeed a global problem.³

The victims detected in South Africa, for instance, are trafficked from different parts of Sub-Saharan Africa, including West and East Africa. People originating from East Asia, South Asia and Eastern Europe were identified as trafficked persons in Southern Africa.⁴

Human Trafficking is as old as slavery. A well-known case, is that of Sara Baartman who was taken to Europe in 1810. She had contracted with an Englishman to go and work in England.⁵

Sara Baartman’s large buttocks and unusual colouring made her the object of fascination by the colonial Europeans who presumed that they were racially superior. Dunlop wanted Sara to come to London and become an oddity for display. She was taken to London where she was displayed in a building in Piccadilly, a street that was full of various oddities like “the ne plus ultra of hideousness” and “the greatest deformity in the world”. Englishmen

¹ UN General Assembly ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’ 15 November 2000 art 3, available at <https://www.refworld.org/docid/4720706c0.html> accessed 14 October 2019; SA signed 2000 and ratified 2004. Hereinafter referred to as Palermo Protocol.

² United Nations Office on Drugs and Crime ‘Global report on trafficking in persons 2016’ 2016. 23.

³ Ibid at 88.

⁴ Ibid at 116.

⁵ South African History Online ‘Sara “Saartjie” Baartman’ 2013 available at <http://www.sahistory.org.za/people/sara-saartjie-baartman>, accessed on 27 June 2017.

and women paid to see Sara's half naked body displayed in a cage that was about a metre and half high. She became an attraction for people from various parts of Europe.⁶

Her remains were only returned to South Africa in 2002, nearly 200 years later.

In the early 2000s, there were various reports and court cases that suggested that South Africa has a severe problem of human trafficking. The drafting of national anti-trafficking legislation, the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (PCTP)⁷ was a long, slow process.⁸ The Children's Act 38 of 2005⁹ (the Children's Act), and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007¹⁰ (Sexual Offences Amendment Act) were used to provide anti-trafficking legislation as temporary measures. The Children's Act was being drafted and the clause on trafficking was thus incorporated and the Sexual Offences Amendment Act was amended to cater for anti-trafficking legislation. In the case of the latter, it was limited to exploitation for purposes of sexual exploitation. PCTP was enforced in 2015.

1.1 Research Statement

The research question under consideration is, "Is SA law and policy equipped to deal with the peculiarities of Human Trafficking?"

This dissertation's central thesis is that the legal and policy response to human trafficking in South Africa is inadequate to deal with its peculiarities. The anti-trafficking response must extend beyond the application of human rights and criminal law to include a cross-cutting, multi-sectoral, socio-economic and political response that addresses its causes and consequences.

This research argues that people are being trafficked in ever-increasing numbers despite international criminal law, the international and regional human rights framework and domestic legislation which all seek to eradicate it and apply both positive and negative measures for dealing with this crime. Trafficking in persons continues globally although we have numerous treaties that seek to promote and protect the human rights of all. Victims of human trafficking typically experience the violation of multiple human rights on an ongoing basis, whilst they are being trafficked, including the violation of their non-derogable rights. 'There can be no

⁶ South African History Online Ibid note 5.

⁷ Prevention and Combating of Trafficking in Persons Act 7 of 2013. Hereinafter referred to as PCTP or Anti-Trafficking Act.

⁸ Kimberly Thomas *Connecting the global to the local? The United Nations Protocol to prevent, suppress and punish trafficking in persons and the South African Prevention and combating of trafficking in persons Act 7 of 2013* (unpublished MPhil thesis, University of Cape Town, 2016) at 22.

⁹ Children's Act 38 of 2005 s1.

¹⁰ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s15, s16, s17 s70(2)(b).

doubt that the spirit of the entire corpus of human rights law rejects, absolutely, the practices and results that are integral to the human trafficking process.’¹¹ The causes and consequences of human trafficking in South Africa is not being sufficiently addressed, if at all.

This research will show that anti-trafficking responses in South Africa need to address the protection of people being trafficked, promotion of human rights and the prevention of human trafficking with the same rigour as the prosecution thereof and should be a cross-cutting, multi-sectoral, socio-economic and political response.

1.2 Literature Review

The literature review highlights research conducted in recent years drawn from both primary and secondary sources. Subsequent chapters will elucidate on these studies and draw on numerous sources as evidence.

Frankel 2016, provides an extensive picture of human trafficking in South Africa.¹² His qualitative research conducted over a period of three years offers insight into the nature of human trafficking in South Africa. Frankel describes who it affects, where people may be trafficked from and to, the exploitation trafficked persons’ experience and related processes. His research presents some vivid descriptions of the horrors of trafficking in persons in South Africa.

It is widely reported that trafficking in persons is one of the most lucrative criminal activities involving 100 000s of victims. Frankel says 20-35 million victims per year are ‘guesstimated’, generating approximately US\$32bn per annum.¹³ The numbers are not easy to verify because there are very few convictions, trafficking often involves groups of victims and traffickers usually commit this crime repeatedly, very few charges are brought and even less convictions are made.¹⁴

Frankel recounts how the desperation of poverty makes people vulnerable to the deceitful too-good-to-be-true stories of unscrupulous recruiters. They manipulate and deceive people into travelling with them to another city where the ugly truth will be revealed.¹⁵

The realities of trafficking in persons often remains hidden. At a local level human trafficking is often narrated as caused by stranger danger and as an act by hardened criminals.

¹¹ Anne T Gallagher *The International Law of Human Trafficking* (2010) 5.

¹² Philip Frankel *Long walk to Nowhere: Human Trafficking in Post-Mandela South Africa* (2016) at 1.

¹³ *Ibid.*

¹⁴ United Nations Office on Drugs and Crime ‘Human trafficking knowledge portal case law database’ available at <https://www.unodc.org/cld/v3/htmls/cldb/index.html?lng=en>, accessed on 16 October 2019. UNODC Case Law Database only has 16 cases listed.

¹⁵ Frankel op cit note 12 at 30, 85.

This obfuscates some of the realities of human trafficking, some traffickers are part of local or international organised crime.¹⁶ Often times the recruiting trafficker is known to the victim and may be a family member, neighbour or trusted friend; the person recruits or hands over an unsuspecting person to traffickers, an example is *S v Jezile*.¹⁷

Aransiola and Zarowsky argued that victims of human trafficking have their human rights violated in two ways, first whilst being held by the trafficking syndicates. Secondly, prior to the domestication of the Palermo Protocol, once rescued, trafficking victims' rights were violated through justice being denied or delayed.¹⁸

The study identified some human rights that are often violated 'denied free movement' 'used and are exploited' 'trafficked people, especially children, are denied access to schooling and their normal development processes are distorted' and 'removed from social support networks'.¹⁹ In addition, trafficked persons 'have no control over their lives and their labour' 'generally, many trafficked victims are ill-treated and subjected to inhuman conditions by their captors'²⁰ and 'females, used for sexual exploitation or are exposed to sexual abuse'.²¹ Trafficked persons are victims of crime including 'gender-based violence', 'sexual abuse', being force-fed drugs to get them addicted and to engage in prostitution and work under poor and harmful conditions. They may also be used to commit crimes like 'drug trafficking', smuggling arms and 'gang robbery'.²²

Aransiola et al, proceed to argue that South Africa's new legislation incorporates the protection, prevention and prosecution of human trafficking and is well aligned with the Palermo Protocols. It is cautioned that prevention of human trafficking and protection of victims will be strenuous and demanding to attain. It necessitates additional prescient, forward looking engagement that is constructive and feasible for the law to be most effective.²³

Aransiola and Zarowsky, argue for dedicated shelters to accommodate those rescued, access to health services to address both physical and mental health needs and programmes that address the economic empowerment of victims.

¹⁶ *Netcare Kwa-Zulu Ltd v S* 41/1804/2010. (trafficking of organs in particular body parts).

¹⁷ *Jezile v S and Others* 2016 (2) SA 62 (WC). (A 14year old girl was married to Jezile, 28, through an aberrant version of *ukuthwala*, he paid her family lobola of R8000. When she ran away from him back to her family, they returned her to Jezile).

¹⁸ Joshua Aransiola & Christopher Zarowsky 'Human trafficking and human rights violations in South Africa: Stakeholders' perceptions and the critical role of legislation' (2014) 14(2) *AHRLJ* 509 at 510.

¹⁹ *Ibid* 519.

²⁰ *Ibid* 519.

²¹ *Ibid* 520.

²² *Ibid* 521.

²³ *Ibid* 525.

Kreston identifies the following as factors that put people at risk of being trafficked violence against women and children; concealment of incest and rape; discrimination and devaluation of women and children, lack of educational opportunities, patriarchy, unemployment/underemployment, political instability, armed conflict, and even natural disasters.²⁴

She identifies the general lack of knowledge of the harmful nature of trafficking and its profitability as contributing to the growing problem.²⁵ Trafficked persons are subjected to powerful psychological coercion and control that results in ‘numbness’, ‘powerlessness’, self-blaming, ‘dissociative responses’ and ‘learned helplessness’.²⁶

Singh speaks of the gendered nature of trafficking, that mostly girls and women are trafficked.²⁷ In countries where law and customs collude and perpetuate gender inequality and fail to give full effect to women’s human rights, it is women and girls who are most likely to be seeking out and respond to opportunities that recruiters offer.²⁸ These offers typically are marketed as much better job prospects in another country and weighed against the bleak future that their daily lives present, it is easy for them to accept. Singh explains that it is only on arrival at their destination that the ruse becomes evident to the women, typically when the true nature of the work, conditions of service and or debt bondage is revealed.²⁹

In summing up Singh purports that

The litmus test will be whether countries claiming to uphold and protect women's rights; and address the inequality in status and opportunity that makes women vulnerable to trafficking and other abuses, will commit to the challenge.³⁰

Human rights are enshrined in many human rights treaties with a core that is widely ratified by governments. Within the human rights corpus particular rights have attained *jus cogens* status. Rehman identifies the following rights as having attained *jus cogens* status,³¹

Right to equality and non-discrimination article 2;
freedom and equality article 1

²⁴ Susan S Kreston ‘Human trafficking legislation in South Africa: Consent, coercion and consequences’ (2014) 27(1) *SACJ* 20 at 23.

²⁵ *Ibid.*

²⁶ *Ibid* 31.

²⁷ Divya Singh ‘Piercing the veil on trafficking in women’ (2004) 37(3) *The Comparative and Int LJ of Southern Africa* 340 at 340, 341; UNODC director at the time.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid* 362.

³¹ Javaid Rehman *International Human Rights Law: A practical approach* (2003) at 61.

dignity non-discrimination article 2³²

equality and non-discrimination article 2³³

right to life article 6;

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment article 7;

No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited. No one shall be held in servitude article 8;

liberty and security of person article 9³⁴

Jus cogens status means that these are non-derogable rights. States are obligated to promote these rights and act against any violations thereof. It is therefore of concern that these rights continue to be violated daily, all across the world as reflected in the statistics on the prevalence of human trafficking and as the chapter on the lived experiences of human trafficking in South Africa will elaborate.

1.3 Research Method

This thesis is limited to desktop sources as empirical research would have been too costly. A broad outline of trafficking in persons and how it manifests in South Africa in particular is explored.

The dissertation considers the causes of human trafficking and the consequences thereof for the trafficked persons. A broad overview of the international and regional human rights framework in relation to trafficking in persons is provided and critiqued. The South African legislative framework and jurisprudence is then introduced and critiqued with due consideration being given to the state's obligation to prevent, protect and prosecute trafficking in persons.

This dissertation will explore both primary and secondary data sources, it will review and critique treaties, protocols, laws, policies and regulations and jurisprudence and will reference journal articles, reports and books as authority. Reference will also be made to an

³² UN General Assembly 'International Convention on the Elimination of All Forms of Racial Discrimination' 21 December 1965 United Nations Treaty Series vol 660 p195 available at <https://www.refworld.org/docid/3ae6b3940.html>, accessed 14 October 2019; SA signed and ratified 1998.

³³ UN General Assembly 'Convention on the Elimination of All Forms of Discrimination Against Women' 18 December 1979 United Nations Treaty Series vol 1249 p13 available at <https://www.refworld.org/docid/3ae6b3970.html>, accessed 14 October 2019; SA signed and ratified 1995.

³⁴ UN General Assembly 'International Covenant on Civil and Political Rights' 16 December 1966 United Nations Treaty Series vol 999 p171 available at <https://www.refworld.org/docid/3ae6b3aa0.html>, accessed 14 October 2019; SA signed and ratified 1998.

essay submitted by myself, for another course.³⁵ It was indeed the research for this essay that inspired further investigation into human trafficking as this dissertation topic.

An intersectional feminist lens in conjunction with standpoint theory is applied in considering the central thesis. Standpoint theory posits that one's standpoint determines worldview. It rejects relativism and acknowledges the hegemony that resides in epistemology of the oppressor and in privileged social groups. It values the epistemology of oppressed and marginalised social groups arguing that their views are more complete than the privileged precisely because it is their reality under discussion. Thus, the marginalised are more motivated to understand the issues and seek solutions and have less reason to defend prevailing conditions.³⁶ Intersectional feminism argues that one oppressive system, in particular race, class and gender, is not greater than another. These systems, are structural and interact with each other as well as other oppressive systems to ensure the subjugation of one group by another.³⁷ The structures need to be dismantled to break the systems.

I write as a black woman, survivor of sexual violence, born into a working-class family during apartheid. I write as a victim of crimes against humanity. I write as a feminist who strives for justice and an end to inequality. I have worked with vulnerable populations including girls and young women who were trafficked for purposes of sexual exploitation as well as with girls and young women who were sexually exploited through pornography or prostitution. The focus of the project I worked in was to exit the young women from these situations and to support their reintegration and healing processes. State services did very little to prioritise their needs and to support the girls and young women, even though the project was funded by the Provincial Department of Social Development. This experience was a key motivation for the thesis topic.

1.4 Outline of the Chapters

Chapter 1 includes a literature review incorporating a wide array of sources including treaties, case law, journal articles and books. Chapter 2, focuses on defining human trafficking, and its causes and consequences. This chapter draws on the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Prevention and

³⁵ International protection of human rights PBL5631F was completed as part of the requirements of this MPhil; the essay was completed as part of the requirements for the course Title: The Prevalence of Trafficking in Persons in South Africa.

³⁶ Sandra Harding 'Standpoint Theories: Productively Controversial' (2009) 24(4) *Hypatia* 192 at 194.

³⁷ Djamila Ribeiro 'Black Feminism for a new civilizatory framework' (2016) 13(24) *Sur International Journal on Human Rights* 99 at 101.

Combating of Trafficking in Persons Act 7 of 2013 to define human trafficking or trafficking in persons (TIP). The causes and consequences of TIP are explored and presents the context. Chapter 3 focusses on the experiences of human trafficking in SA and addresses the peculiarities and specificities of this crime. Chapter 4 discusses the international and regional legal framework and identifies a number of treaties, protocols and policy guidelines, highlighting their relevance for TIP.

Chapter 5, focusses on the South African legislative framework and identifies the relevant laws and regulations and policies that are relevant to TIP. It explores policy taking into account the state obligations for both positive and negative measures. It will also consider SA jurisprudence on human trafficking. Chapter 6, offers a critical analysis of the thesis, Is SA Law and Policy equipped to deal with the peculiarities of human trafficking. Recommendations will be discussed with a focus on addressing the causes and consequences of human trafficking.

CHAPTER 2 DEFINING HUMAN TRAFFICKING, CAUSES AND CONSEQUENCES

Trafficking in persons is widely perceived as one of the worst crimes of the 21st century. However, defining trafficking in persons is complex and many people do not fully understand what it entails. This chapter presents the definitions found in the Palermo Protocol and South African legislation and contextualises trafficking in persons by outlining the causes and consequences.

2.1 Defining Human Trafficking

2.1.1 The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)³⁸

The Palermo Protocol is the guiding international law instrument on trafficking in persons and provides the first international definition thereof.

The Palermo Protocol was signed by 117 States Parties, ratified by 170 of States Parties and entered into force on 25 December 2003. South Africa ratified the Palermo Protocol in February 2004.

The preamble declares

effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,³⁹

Article 2 provides the statement of purpose as follows

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

³⁸ *Palermo Protocol* supra note 1.

³⁹ Supra at preamble.

- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.⁴⁰

The Palermo Protocol, article 3, defines trafficking in persons (TIP)

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.⁴¹

Trafficking in persons is defined in detail in the Palermo Protocol, it can be taken to have three distinct components, action, means and purpose. Action refers to the trafficker’s specific action: recruiting, transporting, transferring, harbouring or receiving of person; means identifies how the trafficker gets the person from one place to the next and keeps them in the exploitation by threat, deception or use of force; and purpose specifies the purpose of exploitation.

The Palermo Protocol identifies forms of exploitation including prostitution, sexual exploitation, forced labour, slavery or practices similar to slavery and the removal of organs. This definition highlights that people are trafficked into three key situations namely forced labour, forced labour for sexual exploitation and use of organs. Trafficked persons are often

⁴⁰ *Palermo Protocol* supra note 1 art 2.

⁴¹ Supra at art 3.

kept under severe conditions of slavery or slavlike conditions. Although most slaves were trafficked, a person who was trafficked need not be a slave.⁴²

If any of the stated means were used during the trafficking process then a victim of trafficking's consent cannot be considered a valid defence.⁴³ In the face of threat, deception, abduction, abuse of their vulnerability, abuse of power, coercion or force or violence or the giving or receiving of payments or benefits to achieve the consent of a person or someone who has authority or control over another person, the consent is irrelevant. Kruger and Oosthuizen emphasise that often consent may be granted at the initial stage of the trafficking because people believe the story that they are told about being recruited for a wonderful job opportunity only to arrive at the destination and discover that they were deceived. In these cases, the trafficker often argues as a defence that the victim agreed to travel with them. This argument is inconsequential since the means are present.⁴⁴

The protocol defines a child as a person under the age of 18. Article 3c states in the case of child trafficking the means need not be present. A child is trafficked where the actions of recruitment, transport and transfer and exploitative purpose are present, consent is of no consequence. Consent in the case of child trafficking is thus irrelevant.⁴⁵

As women and children are trafficked in large numbers due to their vulnerability, including 'abuse of vulnerability' as part of the means in the Palermo Protocol is a significant step toward realising women's and children's human rights.

2.1.2 Prevention and Combating of Trafficking in Persons Act 7 of 2013⁴⁶

The Prevention and Combating of Trafficking in Persons Act 7 of 2013 (Anti-human Trafficking Act or PCTP) was assented to in 2013 and entered into force in 2015.

Chapter 1.3 makes provision for

3. The objects of this Act are to— (a) give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements;

⁴² Benjamin N Lawrance & Richard L Roberts 'Introduction: Contextualising trafficking in women and children in Africa' in Benjamin N Lawrance & Richard L Roberts (eds) *Trafficking in Slavery's Wake: Law and the Experience of Women and Children in Africa* (2012) 2 at 6.

⁴³ *Palermo Protocol* supra note 1 at art 3b.

⁴⁴ Beatri Kruger & Hennie Oosthuizen 'Looking behind the mask of confusion towards a better understanding of human trafficking' (2011) 12(2) *Child Abuse Research: A South African Journal* 46 at 55.

⁴⁵ *Ibid* 55; Kreston op cit note 24 at 22.

⁴⁶ *PCTP* supra note 7.

- (b) provide for the prosecution of persons who commit offences referred to in this Act and for appropriate penalties;
- (c) provide for the prevention of trafficking in persons and for the protection of and assistance to victims of trafficking;
- (d) provide services to victims of trafficking; (e) provide for effective enforcement measures; (f) provide for the co-ordinated implementation, application and administration of this Act, including the development of a draft national policy framework; and
- (g) combat trafficking in persons in a co-ordinated manner.⁴⁷

Trafficking is defined as

4. (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of— (a) a threat of harm; (b) the threat or use of force or other forms of coercion; (c) the abuse of vulnerability; (d) fraud; (e) deception; (f) abduction; (g) kidnapping; (h) the abuse of power; (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.
- (2) Any person who— (a) adopts a child, facilitated or secured through legal or illegal means; or (b) concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence⁴⁸

The passing of the PCTP was part of the domestication of the Palermo Protocol and international criminal law. Researchers agree that the PCTP complies with the Palermo Protocol.⁴⁹

It is important to consider the question of consent in defining human trafficking. Offenders may argue as part of their defence that either the trafficked person or someone who has authority over them, as in the case of a child, gave consent. The PCTP and Palermo

⁴⁷ *PCTP* supra note 7 at chap 1 s3.

⁴⁸ Supra note 7 at chap 2 s4.

⁴⁹ Thomas op cit note 8 at 103; Kreston op cit note 24 at 24, Aransiola op cit note 18 at 523.

Protocol define a child as under 18-years-of-age. The PCTP and the Palermo Protocol agree on the irrelevance of consent in the case of child trafficking.

Kreston posits that s11 eliminates the defence that an adult consented where the means used are as outlined in s4, in essence PCTP makes the defence of a victim consenting irrelevant.⁵⁰ This is congruent with article 3(b) of the Palermo Protocol.⁵¹

Strengths of PCTP

A strength of the Anti-human Trafficking Act is that it encompasses all involved in the process as committing an offence, extending liability to persons who hold authority and have others act on their behalf as well as where the purpose of exploitation was not achieved but intended.⁵²

Another strength is that the PCTP provides for debt bondage; possession, destruction, confiscation, concealment of or tampering with documents; using services of victims of trafficking; conduct facilitating trafficking in persons and liability of carriers as offences.⁵³

The PCTP goes beyond the Palermo Protocol in some aspects.⁵⁴ The scope of actions is greater including: delivers, sells, exchanges, leases person within or across the borders of SA. The means are expanded to include kidnapping; the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship. The PCTP includes adoption and forced marriage as purposes of exploitation.⁵⁵ Instead of removal of organs, the removal of body parts is listed in this broader definition of exploitation.⁵⁶ Furthermore ‘the impregnation of a female against her will for the purpose of selling her child when the child is born’ is stipulated.⁵⁷

The PCTP provides for more than just transnational application with the inclusion of the phrase ‘within or across the borders ...’.⁵⁸ This is significant as it addresses in-country

⁵⁰ Kreston op cit note 24 at 27; Kruger op cit note 44 at 55, 56.

⁵¹ Harding op cit note 35 at 8.

⁵² PCTP supra note 7 at chap 2 s4, s10 s11.

⁵³ Supra note 7 at chap 2 s5, s6, s7, s8, s9.

⁵⁴ Thomas op cit note 8 at 93.

⁵⁵ Ibid.

⁵⁶ Susan Kreston ‘The Story of Elsie: A case study of trafficking in contemporary South Africa’ in Benjamin N Lawrance & Richard L Roberts (eds) *Trafficking in Slavery’s Wake: Law and the Experience of Women and Children in Africa* (2012) 208 at 210.

⁵⁷ PCTP supra note 7 at para 20 p10.

⁵⁸ Supra note 7 at s4.1.

human trafficking, which occurs in South Africa, and not only transnational human trafficking which is the focus of the Palermo Protocol.⁵⁹

Weaknesses of PCTP

The PCTP has weaknesses though. It fails to offer clear guidelines for actual identifying of a victim of trafficking, which has the potential for victims to be unsupported or prosecuted.⁶⁰

The PCTP fails to adequately address ‘root causes of human trafficking’, ‘links between human trafficking and other related crimes’, ‘cultural practices’, ‘training of persons who are to assist’.⁶¹ The accreditation requirements for organisations may prove to be so steep that they become exclusionary.⁶²

2.2 Causes of Human Trafficking

This thesis argues that it is essential for any anti-human trafficking response to address the causes of human trafficking and that South Africa’s current response fails to do so sufficiently. The causes are considered at macro and micro levels. The macro level discussion explores the deeper epistemic, structural and systemic causes of human trafficking, with a focus on patriarchy, neo-liberalism and colonialism which serve as the wider and deeper context. The micro level discussion explores how these factors manifest in supply and demand factors.

The belief that all people are not equal and therefore some people can be owned and traded like property is not new. Historically women, children and peasants have been treated as property as far back as 349 BC when Aristotle wrote in *Nicomachean Ethics*,

There cannot be injustice towards that which is one’s own; and a chattel, or a child, until it is of a certain age and has attained independence, is as it were part of oneself; and nobody chooses to injure himself (hence there can be no injustice towards oneself) and so neither can there be any conduct towards them that is politically just or unjust.⁶³

This thinking continues to pervade attitudes in the 21st century most starkly reflected in the human trafficking underworld.

⁵⁹ Thomas op cit note 8 at 93.

⁶⁰ Ibid at 104.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Barbara Bennett Woodhouse *Hidden in Plain Sight: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate*. (2008) at 62 available at <http://www.jstor.org/stable/j.ctt7rr8c>, accessed on 4 April 2019.

2.2.1. Macro Causes

The macro causes of human trafficking are an interplay between the systems of patriarchy, neo-liberalism and colonialism which have produced socio-economic conditions that place individuals and communities in the desperation of poverty. In South Africa, the system of apartheid's legalised racism solidified this interplay and effectively banished Black South Africans to lives of poverty.

Patriarchy is an ancient hegemonic oppressive system which is prevalent throughout the world. A patriarchal society is organised to give men authority over women. Men may also have authority over other men where other social constructs intersect eg race, sexual orientation, class, age and ability. Cisgender people have power over transgender people. Men from colonising countries by virtue of racial discrimination and colonisation hold power over men from colonised countries.⁶⁴ Similarly, 'some women have power over other women',⁶⁵ in some societies like South Africa, during colonialism and apartheid, white women's status was elevated over black women and black men.

The conception and social construction of sexuality by patriarchy is an important means of subjugating women and gender non-conforming persons.⁶⁶

Patriarchy has extended itself to legal and other forms of reasoning, consequently a rich feminist legal discourse has critiqued and challenged the masculinity of the law and its intersections with race and power.⁶⁷ Alongside of this is a related critique of the human rights framework by feminist scholars.⁶⁸ A key feminist argument has been that human rights protects civil and political rights in the public sphere and protects the right to privacy. It thus fails to protect women in the private sphere keeping the violation of women's rights hidden from society. This dualism persists, although violence against women is recognised as a rights violation.⁶⁹

⁶⁴ Karin van Marle and Elsje Bonthuys 'Feminist theories and concepts' in Elsje Bonthuys and Catherine Albertyn (eds) *Gender, Law and Justice* (2007) 15 at 21.

⁶⁵ *Ibid* at 20.

⁶⁶ *Ibid* at 25.

⁶⁷ Gayle Binion 'Human rights a feminist perspective' (1995) 17.3 *Human Rights Quarterly* 509 at 513.; Kimberlé Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1989(1) *University of Chicago Legal Forum* 139 at 140.

⁶⁸ Celina Romany 'Women as aliens: A feminist critique of the public/private distinction in international human rights law' (1993) 6 *Harvard Human Rights Journal* 87 at 87.

⁶⁹ *Ibid*.

Six structures and systems can be identified as upholding patriarchy and male dominance notably modes of production, paid work, the state, male violence, sexuality and cultural institutions.⁷⁰ These interact with each other in complex ways.

Omorodion argues that the patriarchal nature of Nigerian society is characterised by gender inequality which manifests in explicitly refuting women's right to inherit, supports primogeniture and only recognises heterosexual marriage leaving minimal opportunities for economic success in a highly populated country.⁷¹ Omorodion avers that these conditions, which limit the prospects of success may lead 'young persons, particularly women, to seek alternative sources of wealth generation' and in this way, are vulnerable and easy prey for sex traffickers in particular.⁷²

The study also observed entrapment and forced marriage as key causes, stating that this kind of human trafficking is a form of violence against women and violates women's human rights, in this way the author concludes that 'human trafficking is also a human right issue'.⁷³

It is the deepening of this patrilineal society that has permitted the trade or traffic in human beings over time.

Neo-liberal policies are largely driven by 'the World Bank, International Monetary Fund, the World Trade Organisation and transnational corporations'.⁷⁴ These policies promote globalisation in the form of the 'neoliberal triumvirate of privatization, deregulation/free trade and drastic cuts to government spending'.⁷⁵ The World Bank's loan agreements frequently strip people of social security and protection, by for example requiring governments to 'cut spending on social welfare programmes'.⁷⁶

Globalisation integrates world markets and creates porous borders to enable trade and move capital between countries with minimal government interference. This has been a largely successful manoeuvre; driven by capitalism entire factories move from one country or continent to another, in search of cheaper labour to drive higher profits. In this context women

⁷⁰ Van Marle & Bonthuys op cit note 64 at 21.

⁷¹ Francisca Isi Omorodion 'Vulnerability of Nigerian secondary school to human sex trafficking in Nigeria' (2009) 13(2) *African Journal of Reproductive Health / La Revue Africaine De La Santé Reproductive* 33 at 37 available at <http://www.jstor.org/stable/20617109>, accessed on 6 December 2017.

⁷² Ibid at 38.

⁷³ Ibid at 44.

⁷⁴ Saranel Benjamin 'Masculinisation of the state, feminisation of poverty' (2001) *Agenda* 68 at 69.

⁷⁵ Naomi Klein *The Shock Doctrine: The Rise of Disaster Capitalism* (2007) at 163.

⁷⁶ Benjamin op cit note 74 at 69.

become the preferred options for cheap labour as women's labour is not valued as much as men's labour.

In this climate of high unemployment and limited social security women are often in casual employment for meagre wages, under poor conditions and for no benefits.⁷⁷ It is evident that 'capitalism cannot function without patriarchy and vice versa.'⁷⁸ This feminisation of poverty and labour places a heavy burden on those women with jobs, who earn less and also have to budget for the services that were once freely available from the state. This condition can be referred to as 'capitalist patriarchy'.⁷⁹ This increasing poverty and ever-decreasing resources created a conducive environment for desperately poor people to place their hope in unscrupulous trafficking recruiters who travel to communities and dupe the poor into believing that they have wonderful job opportunities elsewhere.

Colonialism included the destruction of peoples, land, language, cultural beliefs and mores, the stealing of mineral wealth, cultural appropriation, genocide and promoting of Christianity. Slavery was one of the cornerstones of colonialism and a key aspect of trade. The Cartesian dualism of nature-society was central in justifying the slave trade 'the idea of humanity has necessarily coexisted with the idea of subhumanity — the subhumanity of racialized, sexualized bodies'.⁸⁰

This dualism remains prevalent and explains why some people's human rights remain evasive and makes 'human' a contested concept.⁸¹

The Palermo Protocol's definition of exploitation includes slavery. Today, slavery is recognised as a crime against humanity.⁸² The slave trade was a major legal trafficking venture.⁸³ The brutal practice of slavery can be traced back to 1452 when the Pope granted

⁷⁷ Benjamin op cit note 74 at 72.

⁷⁸ Ibid at 69.

⁷⁹ Ibid at 68 quotes Mies M (1986) 'Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour, London and New Jersey: Zed Books.

⁸⁰ Boaventura de Sousa Santos 'The new thesis eleven' available at <http://criticallegalthinking.com/2018/01/20/new-thesis-eleven/>, accessed on 25 February 2018.

⁸¹ Nelson Maldonado-Torres, 'On the coloniality of human rights' 2017 *Revista Crítica de Ciências Sociais* 114 at 122-123 available at <http://journals.openedition.org/rccs/6793>, accessed on 10 January 2018.

⁸² Seymour Drescher 'From consensus to consensus: Slavery in international law' in Allain, J (ed) *The Legal Understanding of Slavery: From the Historical to the Contemporary* (2012) 85 at 85.

⁸³ Ibid at 87.

Portugal authority to enslave.⁸⁴ Contrary to popular belief, slavery did not cease with the abolitionists and the end of ‘legal slavery’.⁸⁵

Slavery persisted and states did very little to stop it.⁸⁶ Slavery continued in various countries through ‘coercive policies such as indentured labour, sharecropping, debt peonage, controls like the British Masters and Servants Laws, enforced apprenticeship, and constraints on land ownership, voting, education, and other political rights’.⁸⁷

Allais explains how slavery continues in the 21st century

the evolution of unfree labour, Picarelli (2007) posits a difference between ‘old’ slavery wherein slaves were held as property and thus deemed valuable and ‘new’ slavery wherein slaves are no longer property but are seen as a disposable commodity.⁸⁸

Thus, slavery enabled capitalism to grow and globalisation maintains this through deregulation and the demand for cheap labour.

2.2.2 Micro Causes

Micro factors that impact on who is trafficked are explored below, this encompasses vulnerable populations, particular risks facing children, conflict and migration as causal factors and unbearable socio-economic conditions.

‘Certain individuals and communities’ are ‘vulnerable to exploitation and governments and civil society have not done enough’⁸⁹ to protect vulnerable people and eliminate the extensive exploitation of human beings.⁹⁰ Migrants crossing the border on foot or fleeing conflict areas are vulnerable to traffickers. Women and girls are rightfully identified as a vulnerable population particularly in respect of sex trafficking. Women and girls are often identified as the only victims of trafficking whilst boys and men are not always afforded the same recognition.⁹¹

⁸⁴ Drescher Ibid note 82.

⁸⁵ SL Engerman ‘The rise, persistence, and slow decline of legal slavery’ in J Allain *The Legal Understanding of Slavery: From the Historical to the Contemporary* (2012) 165 at 172.

⁸⁶ Lawrence op cit note 42 at 3.

⁸⁷ Engerman op cit note 85 at 172.

⁸⁸ Carol Allais ‘The profile less considered: The trafficking of men in South Africa’ (2013) 44(1) *South African Review of Sociology* 40 at 42.

⁸⁹ Jonathan Todres ‘Special symposium feature: Successes and failures in international human trafficking law: Essay: Widening our lens: incorporating essential perspectives in the fight against human trafficking’ (2011) 33 *Michigan Journal of International Law* 53 at 58.

⁹⁰ Ibid.

⁹¹ Ibid at 61.

Children in South Africa are placed at great risk of child trafficking due to ‘three key risk factors’ ‘acute vulnerability’, ‘chronic poverty’ and ‘HIV/AIDS as a risk intensifier’.⁹²

Acute vulnerability of children is characterised by high levels of domestic and community violence including child sexual abuse and the lack of safety and protection.⁹³ The vulnerability of fragile living conditions easily leads a child to engage in harmful or illegal work that is not visible to the family or community.⁹⁴ It is under these circumstances that a child may be recruited into the selling of sex. Girls raised in impoverished families and communities are vulnerable and typically lack social protection.⁹⁵ This vulnerability is frequently exacerbated by the control of patriarchal practices in families including burdening girls with caring for the old, little children, sick or disabled relatives at the expense of their education. In cities these challenges can lead to a girl-child being drawn into drug use and consequent addiction, and eventually sexual exploitation through drug addiction, violence and the demand for sex with young girls.⁹⁶ In rural areas the girl-child can experience forced or early marriage.

Chronic poverty is characterised by a lack of basic income, high unemployment, high school dropout rates and increased urbanisation.⁹⁷ These conditions combined with severe historical service delivery backlogs in extremely rural communities contributes to the exploitation of children through harmful child labour practices.⁹⁸

HIV/AIDS has intensified the risks facing all those infected and affected by the syndrome. The South African government reported having audited 92 000 child-headed households.⁹⁹ Older children or grandparents have assumed parental duties in these homes where parents have died.¹⁰⁰

Socio-economic conditions cause vulnerable populations to migrate and seek better work opportunities, many become victims of human trafficking.¹⁰¹ People tend to migrate from

⁹² Lucie Cluver, Rachel Bray & Andrew Dawes ‘Monitoring the worst forms of child labour, trafficking and child commercial sexual exploitation’ in Andrew Dawes, Rachel Bray & Amelia van der Merwe (eds) *Monitoring Child Well-Being: A South African Rights Based Approach* (2007) 247 at 253.

⁹³ Ibid; Molo Songololo ‘The trafficking of children for purposes of sexual exploitation – South Africa’ 2000 at 27.

⁹⁴ Cluver et al op cit note 92 at 254.

⁹⁵ Molo op cit note 93 at 27.

⁹⁶ Shameela Horner & Lorna Houston ‘My journey to hope’ (2006) 20 (70) *Agenda* 134 at 134.

⁹⁷ Molo op cit note 93 at 27.

⁹⁸ Cluver et al op cit note 92 at 253.

⁹⁹ Government Communications and Information Services ‘South Africa Yearbook 2015/2016 Social Development’ 2016 at 385.

¹⁰⁰ Cluver et al op cit note 92 at 254.

¹⁰¹ Todres op cit note 89 at 59.

one place to another due to poverty, unemployment, displacement, violence and due to violence against women in conflict or post-conflict conditions. In places with high levels of conflict the degree of political instability, infrastructural damage, access to food and physical safety will vary. The extent to which these factors are dominant play a key role in the decision to migrate. In addition, the persecution of a particular group will also lead to migration. Unscrupulous traffickers frequently use migrant routes to prey on vulnerable migrants. Migrants whether documented or undocumented are easily lured into a situation where people take away their papers and threaten to report them to the authorities for deportation.¹⁰² This is even more likely in a country where they are unfamiliar with local customs and language. Restrictive migration policies which make crossing national borders difficult, increases vulnerability.¹⁰³

Adverse socio-economic conditions with widespread poverty and unemployment and lack of education are key causes of human trafficking around the world.¹⁰⁴ Infrastructure development projects which rely heavily on men's labour often results in increased demand for commercial sex. It remains unclear what drives the specific demand for sexual services of women in general, from outside of the country or at all.¹⁰⁵

The Palermo Protocol identifies poverty, underdevelopment and lack of equal opportunity as factors that cause vulnerability to human trafficking.¹⁰⁶ International and domestic law falls short in addressing these causes of trafficking thus the protection measures are limited. The law needs to better account for the root causes of vulnerability and the experiences of trafficked persons to successfully reduce the incidence of human trafficking.¹⁰⁷

There is a greater demand than supply for human organ replacement which has led to the growth of the trafficking of people to exploit them for their organs.¹⁰⁸

2.3 Consequences of Human Trafficking

Human trafficking affects the trafficked person's access to justice, levels of social support, education, training and work life and their health.¹⁰⁹ The consequences of these are explored

¹⁰² Frankel op cite note 12 at 11.

¹⁰³ Elize Delpont, Karin Koen & Angela Mackay United Nations Educational Scientific and Cultural Organisation Policy Paper Poverty Series 14.5(e) 'Human trafficking in South Africa: root causes and recommendations' 2007 at 32.

¹⁰⁴ Omorodion op cite note 71 at 44; UNESCO Ibid at 32.

¹⁰⁵ K Koen 'Crossing borders and boundaries: From "Foreign prostitutes" to "Victims of trafficking in persons"' (2004) 62 (2,1) *Agenda* 85 at 91.

¹⁰⁶ *Palermo Protocol* supra note 1 at art 9.4.

¹⁰⁷ Todres op cite note 89 at 62.

¹⁰⁸ Kruger op cit note 44 at 53.

¹⁰⁹ Aransiola op cite note 18 at 519.

below as well as the discrimination trafficked persons experience. The trafficked person is in an exploitative environment which is undeniably harsh with long work hours, unsafe working and living conditions and in the case where people are enslaved it is particularly severe. Trafficked persons lose a part of themselves in the experience of trafficking, furthermore their life trajectory is interrupted.¹¹⁰ The extent of the harmful effects of the experience of human trafficking is mitigated by the harshness of the environment, the nature and duration of the trafficking and the relationship with the exploiters.

In the process of trafficking the victim experiences multiple human rights violations, at each such instance their right to access justice is also violated.¹¹¹ Once the person is released from the trafficking situation, they may experience delayed justice or no justice either due to weak investigation skills, corruption in the system, organised crime paying the best lawyers to defend them or poor implementation of regulations by state officials.

Trafficked persons are removed for protracted periods from their families and communities, when they return various circumstances may have changed. This is influenced by time passed, nature of the relationships they had before and the current living conditions. Family and community may struggle to be supportive of them due to extreme poverty, lack of resources, and complex emotional trauma including drug addiction. In the case where a relative has been responsible for the trafficking it may be difficult to establish social support.¹¹²

If the trafficked person is released in a destination country and needs to stay there for the court case, they have limited social support. They may face language barriers and are at the mercy of immigration officials if there are no specific policies and procedures in place.

In the case of child marriage, the trafficked person is isolated from their family and community and should they run away to return to their family, due to the bride price paid, they are likely to be sent back to the man they are married to.

The trafficked person is likely to be overwhelmed after being released from a trafficking situation. They will be faced with a number of challenges in attempting to get their life into a healthy pattern after being interrupted by the terrible experience of human trafficking. They will need the capacity to complete the necessary administrative work for reporting and prosecutorial reasons, obtaining identity documents or other papers, apply for jobs, access

¹¹⁰ Aransiola op cite note 18 at 519.

¹¹¹ Ibid.

¹¹² Ibid.

education and training opportunities and they will need to decide how to explain the gap in their resumé.

Trafficking into child marriage often leads to girls having babies very young thus reducing her chances for further education, worsening her economic situation and further entrenching an impoverished existence.

The health of trafficked persons is severely impacted and for those who are sexually exploited their sexual and reproductive health would also be significantly compromised.

Substance abuse may be a consequence of trafficking, this may include ‘alcohol, inhalants and intravenous drugs’.¹¹³ Drug addiction is present in some cases, typically in the instances of sexual exploitation. The duration of the addiction and the specific drug used will influence the severity of the physical damage to the body as well as the psychological damage of shame and the battle to end the addiction.

Trafficked persons may have physical injuries due to violence, beatings, rape, broken bones or wounds these may be old scars or wounds that have not yet healed.¹¹⁴ Infectious diseases could be contracted including sexually transmitted infections, sexually transmitted diseases, the human immunodeficiency virus and tuberculosis resulting in a weakened immune system.¹¹⁵ Abortion and delivery of babies in inappropriate conditions can also result in various conditions as well as ‘gynaecological infection and permanent damage to reproductive organs.’¹¹⁶ Any number of conditions may arise due to lack of access to adequate healthcare, treatment and doctors for example ‘cervical and other types of cancer, stunted growth, malnutrition, dental health problems, skin diseases, neurological symptoms, gastrointestinal problems and lice.’¹¹⁷ The psychological impact and trauma is likely to manifest in ‘post-traumatic stress disorder, anxiety, depression, insomnia and suicide’.¹¹⁸ Emotional fragility, insecurity, anger, worry and fear makes adjustment to a more functional life challenging.

Trafficked persons often experience discrimination, this may be in the form of ‘xenophobic attacks’, violence against women or ‘gender-based violence especially sexual abuse’.¹¹⁹

¹¹³ Kreston op cit note 24 at 33.

¹¹⁴ Ibid; Aransiola op cit note 18 at 522.

¹¹⁵ Kreston op cit note 24 at 33; Aransiola op cit note 18 at 519.

¹¹⁶ Kreston op cit note 24 at 33.

¹¹⁷ Ibid.

¹¹⁸ Kreston op cit note 24 at 33; Aransiola op cit note 18 at 522.

¹¹⁹ Aransiola op cit note 18 at 522.

2.4 Conclusion

Trafficking in persons was defined in this chapter in reference to the PCTP and Palermo Protocol noting specific differences between the two documents and the strengths and weaknesses of the former. Key concepts explored include forms of action, means and purpose; consent; abuse of vulnerability; identification of victims and causes. In an effort to contextualise this crime the causes and consequences thereof were explored.

**CHAPTER 3 EXPERIENCES OF HUMAN TRAFFICKING IN SOUTH AFRICA -
WHAT ARE THE PECULIARITIES – WHY HUMAN TRAFFICKING IS A
DIFFERENT CRIME TO EG HOUSE BREAKING, ROBBERY**

This chapter explores the lived experiences of trafficking in persons in South Africa highlighting the peculiarities and specificities of this crime. Human trafficking as a crime is different to many other criminal activities, as outlined above, it comprises several criminal acts, some of which are repeated daily due to the form of exploitation and other criminal activities may be a single experience. Trafficking takes place in a number of different locations and is almost always executed by more than one person. Frequently trafficking in persons includes a combination of force and deceit.

Trafficking by definition includes specified forms of exploitation. The Tsireledzani report found that people in SA are trafficked for the following exploitative purposes.

including trafficking for prostitution, pornography, forced marriage, domestic servitude, forced labour, begging, and criminal activity including drug trafficking....
sex tourism
labour exploitation of migrants ... from ... neighbouring countries
body parts for muti and religious rituals¹²⁰

Failure to distinguish between those who have been exploited and others who have been trafficked and exploited is one of the key reasons trafficking victims are not being identified. After all it is impossible to know when you see a woman in a brothel or a man in the mines or a child in the fields how they arrived there, and under what circumstances. This is why people tend to see and recognise the exploitation without detecting the trafficking. It is impossible to describe trafficking accurately, every occurrence of human trafficking is nuanced and influenced by multiple variables, which adds to the complexity of identifying human trafficking in action. The descriptions below are not exhaustive and do not even include the use of the internet in human trafficking.

Bales and Soodalter explain that the very nature of the crime of human trafficking and enslavement is clandestine and therefore difficult to identify and quantify. At times it literally occurs in the dark and at other times it hides in plain sight without being distinguished for what

¹²⁰ NPA 'Tsireledzani: Understanding the dimensions trafficking in Southern Africa' 2010 at xiv.

it is. If human trafficking is not identified it follows that counting victims and traffickers will be impossible.¹²¹

South Africa has not had any reported cases of trafficking in persons for adoption although the PCTP makes provision for this.¹²² The trafficking of children for exploitation as child soldiers has not been identified as an issue in South Africa although it has taken place in war-torn parts of Sub-Saharan Africa, Asia, the Americas and Middle East.¹²³ The latter form of trafficking exploitation will not be discussed. Trafficking in persons in South Africa is most frequently understood as being all about the trafficking of women into prostitution, this is but one form of exploitation that trafficked persons could experience.¹²⁴ This chapter outlines the forms of human trafficking in South Africa, focusing on who the traffickers are, children and trafficking, debt bondage, commercial sexual exploitation, non-sexual forced labour, forced marriage and removal of body parts.

3.1 Traffickers

Traffickers have been identified as organised crime, syndicates, individual agents, criminal groups and people known to the victims may also be involved in recruitment whether friends or family.¹²⁵ *Malaishas* who masquerade as taxi drivers take documented and undocumented foreign nationals from the border as people enter South Africa and deliver them into the hands of exploiters. *Magumagumas* operate at border crossings and are violent gangs who attack and rob migrants and deliver them to exploiters. The *malaishas* and *magumagumas* tend to be opportunistic in their modus operandi.¹²⁶

In 2014, 40 per cent of convicted offenders for trafficking in persons in five countries in Sub-Saharan Africa were women.¹²⁷

¹²¹ Kevin Bales & Ron Soodalter *The slave next door: Human Trafficking and Slavery in America today* (2009) at xiii.

¹²² *PCTP* supra note 7 at chap 2 s4.2.

¹²³ Kruger op cit note 44 at 54.

¹²⁴ Tsireledzani op cit note 120 at 139, 196.

¹²⁵ Molo Songololo 'The trafficking of women into the South African sex industry' 2000 at 24; Tsireledzani op cit note 120 at XIV and XV.

¹²⁶ Tsireledzani op cit note 120 at XV; Frankel op cit note 12 at 140.

¹²⁷ UNODC Global Report op cit note 2 at 114.

3.2 Children and Trafficking

In South Africa children are trafficked for purposes of forced marriage which is child marriage, forced labour, sexual exploitation which is sexual abuse, for the removal of body parts and adoption.

Child trafficking remains largely undetected. Children are entrapped in exploitative situations in the agricultural industry, for example in Marikana in North West province.¹²⁸ Large numbers of children migrate from Zimbabwe and further north to South Africa in search of a better life, but find themselves in forced labour or sexual exploitative situations in Limpopo. It seems that cases of child labour that come to light are not necessarily identified and investigated as human trafficking cases.

Inter-country adoption is contentious, there is a popular argument that it should not be heavily regulated because, after all people with financial resources want to offer a suffering poor child a home. A counter view is that it is adults from the colonising Global North that seek to adopt children. Traffickers have taken advantage of this demand and trafficked groups of children for adoption purposes from countries in the Global South. Trafficking for adoption in South Africa is not well documented, a news report in 2017 reported that traffickers were captured with 15 children, in separate incidences, at OR Tambo airport. The children's documents were falsified and at least one was to be adopted.¹²⁹

3.3 Debt Bondage

Trafficked persons can find themselves in situations where they are exploited through debt bondage whether the trafficking is for sexual or non-sexual labour.

The unscrupulous recruiters typically get the recruited people to agree that they will repay the costs of travel, rent and other expenses with their first pay cheque. This is a setup as the amount is so huge that the repayment has to be extended and enormous amounts of interest is added and more cash needs to be borrowed to see them through the month. In this way they become debt bonded and find it impossible to repay the debt and escape the vicious cycle of working for a minimal amount of money.¹³⁰

¹²⁸ Frankel op cit note 12 at 63.

¹²⁹ eNCA 'Child trafficking: 15 cases thwarted this year' 30 March 2017 *eNCA* available at <https://www.enca.com/south-africa/child-trafficking-15-cases-thwarted-this-year>, accessed on 16 October 2019.

¹³⁰ Frankel op cit note 12 at 85.

3.4 Commercial Sexual Exploitation

Molo Songololo's research in 2000 into trafficking and commercial sexual exploitation and the early research by the International Organisation for Migration (IOM) raised awareness and focussed attention on the trafficking of women and children into sexual exploitation.¹³¹ Human trafficking for the purposes of commercial sexual exploitation must be differentiated from child sexual abuse, voluntary sex work and from scenarios where voluntary sex work has become highly exploitative and forced. These situations are often confused for human trafficking. Commercial sexual exploitation is extensive and the exploited persons are easily confused as being victims of trafficking, when this may not have been the case.

Domestic and international victims of trafficking into commercial sexual exploitation were exposed to similar horrendous working conditions. These included: long working hours; limited time off (Monday to Saturday); limited access to health care; violence; threats of violence from clients and management; threats of exposing to the world that the person is a sex worker; debt bondage (usually the foreign victims were bonded with larger amounts); South African women often had drug dependency which increased their problems.¹³²

Subsequent research intended to produce deeper empirical evidence on trafficking for purposes of sexual exploitation in Cape Town did not find much quantitative data. A recommendation from the study concluded that the sex industry should be decriminalised and regulated as this would make it easier to monitor and thus identify trafficked persons. It subsequently argued

international pressure to comply with the Palermo Protocols, as well as to improve South Africa's status on the U.S. State Department's ranking list, contributed to the creation of sex trafficking as a social problem in South Africa.¹³³

Trafficking in persons for the purposes of sexual exploitation is rife. Pornography production, digital cybersex platforms and sex tourism have become the newest products and marketplaces for the sale of sex whether legal or illegal and includes trafficked persons.¹³⁴

Frankle has found that people are trafficked from rural to urban areas; women from Southern Africa, Ghana, Somalia, USA, Russia, Ukraine, Eastern Europe, Asia with women

¹³¹ Molo Songololo 2000b op cit note 125.

¹³² Ibid at 25.

¹³³ Chandré Gould 'Sex trafficking and prostitution in South Africa' (2014) 653 *The Annals of the American Academy of Political and Social Science* 183 at 200; (Initial research is Gould and Fick 2008 *Selling sex in Cape Town: Sex work and human trafficking in a South African city*. Pretoria: Institute for Security Studies).

¹³⁴ Frankel op cit note 12 at 29.

from Thailand being the majority are trafficked into SA for purposes of commercial exploitation. Cape Town, Durban and Johannesburg are the main city destinations where women can be found at brothels or on the street; in upmarket suburbs and informal settlements on the outskirts of the cities.¹³⁵ Pimps are often women, and men are brought in when force and violence is needed to make the exploited victims submit.¹³⁶ Cape Town, Durban, Johannesburg and Port Elizabeth are also reported as key centres for child sex tourism.¹³⁷ Women, and to a lesser extent girls and boys, are also trafficked from the city to larger mining towns with overwhelmingly male populations.¹³⁸

3.5 Non-Sexual Labour

In South Africa, non-sexual labour trafficking is prevalent in three industry sectors, agriculture, mining and domestic work.

The decrease in long term work in the mining sector and the general increase in casual labour contracts has led to the establishment of many labour brokering firms, about ‘3000 small-scale organisations’. Many are unregistered, non-compliant and function with the express intention to make money quickly and easily. These firms deceive young men and women in poor rural communities, in Eastern Cape, Lesotho, Mozambique and KwaZulu-Natal with false promises of a wonderful job, housing, recreation, career advancement and good pay.¹³⁹

They recruit people even if they are not fit to work in mines, and produce fraudulent certificates which certify ‘competence and health’.¹⁴⁰ The certificates are used to secure jobs in registered mining companies with the assistance of corrupt staff in the companies’ human resources department. The trafficked people will find themselves in debt bondage as described above. Noting that they have not been through proper tests and checks for fitness to work in the mines they are in grave danger.

People may be trafficked into illegal mining operations where criminals have taken over abandoned mines. These mines are exceptionally dangerous to work in as they lack safety measures, protective clothing and often the trafficked persons are forced at gunpoint to stay underground for very long.¹⁴¹

¹³⁵ Frankel op cit note 12 at 32.

¹³⁶ Ibid at 29.

¹³⁷ Tsireledzani op cit note 120 at xiv.

¹³⁸ Frankel op cit note 12 at 34.

¹³⁹ Ibid at 84, 85.

¹⁴⁰ Ibid at 86.

¹⁴¹ Ibid at 93.

The agrarian sector in South Africa includes farming (wine, fruit, vegetables, sugar) and commercial wild animals. This sector has a well-documented history of worker exploitation, rooted in slavery. Wine farms engaged in one of the most notorious practices to subjugate people, the *dop* system or tot system by including a daily drink of wine as part of payment for work.

Migrants cross the border into South Africa in the northern and north-eastern parts of the country. They are frequently in extremely vulnerable positions and thus willing to work for very little.¹⁴² The employers are often willing to take advantage of them. In this context traffickers have moved in to exploit people, either deceptively bringing them across the border or using methods similar to the labour brokers recruiting for the mines.¹⁴³

Local children are also sold by poverty-stricken mothers to the farms, placing the children at risk of the dangers of forced child labour and sexual abuse by the farmers.¹⁴⁴

A shortage of labour inspectors, corruption and farmers who obstruct entry using heavy security all contribute to the Department of Labour's ineffectiveness in responding to this problem.¹⁴⁵

Domestic workers are highly exploited. Similar to the mining sector, labour brokerage has flourished and domestic worker agencies now operate as recruiters, some within the legal regulations and others flout the regulations. Trafficking of young women to work as domestic workers frequently occurs from the Northern Cape to Cape Town and from Swaziland to Mpumalanga. Migrants in Soweto are trafficked into various parts of Johannesburg.¹⁴⁶ There are cases where the women are locked into debt bondage, others where there is a blatant disregard for labour rights and basic conditions of employment and consequently the women find themselves in servitude. The reflections of the colonial history of South Africa is ever-present in trafficking for non-sexual labour exploitation. Live-in domestic workers are often kept in a small room at the back of the property out of sight, subjected to 'verbal and physical abuse from 'madams' and sexual violence from the 'masters'.¹⁴⁷

3.6 Forced Marriage

Forced marriage accounts for 1% of human trafficking cases in South Africa, most frequently under the guise of *ukuthwala*, an isiXhosa cultural practice. *Ukuthwala* is commonly practiced

¹⁴² Frankel op cit note 12 at 104.

¹⁴³ Ibid at 103.

¹⁴⁴ Ibid at 106.

¹⁴⁵ Ibid at 107.

¹⁴⁶ Ibid at 110.

¹⁴⁷ Ibid at 111, 112.

in the Eastern Cape near the Lesotho border.¹⁴⁸ In 1998, 7,9 per cent of married women were under the age of 18, child brides, in South Africa.¹⁴⁹ *Ukuthwala* typically affects girls and young women who may be kidnapped by men and then the kidnapper negotiates a bride price with her male relatives and once agreement is reached they get married. Typically, such a young woman will find herself both sexually exploited and in domestic servitude being used as free labour by an older man. The landmark case, *Jezile v S and Others* found that an aberrant version of *ukuthwala* amounts to human trafficking, this is discussed in chapter 6. The case involves a 28-year-old man forcibly marrying a 14-year-old girl-child, this case by implication is about forced marriage, child marriage and child trafficking.

3.7 Removal of Body Parts

Exploitation by the removal of body parts has occurred in the formal healthcare industry, in *muti* and in satanic ritual.¹⁵⁰ This form of exploitation has not yet been prosecuted under the new PCTP, it warrants engagement since it is definitely taking place and people are being sentenced for these criminal acts.

The Netcare Kwa-zulu Limited hospital made an out of court settlement with the state, after pleading guilty to performing 109 counts of illegal kidney transplant operations in violation of South African Human Tissue Act 1983 and the Prevention of Organised Crime Act 1998.¹⁵¹ The nephrologist pleaded guilty to 90 counts and was fined whilst the translator in the case was found guilty of 50 counts of violating the Human Tissue Act of 1983.

Four of the surgeons who were charged had charges dropped due to the length of time it took for the matter to go to trial. The case related to wealthy Israeli citizens travelling to South Africa for illegal kidney transplant operations. The donors were Israeli, Brazilian and Romanian citizens, five were minors. They signed documents stating that they were relatives whereas they were not and did not even know each other.¹⁵²

It was alleged that before these operations were performed in Kwazulu-Natal other registered hospitals in Cape Town and Johannesburg were already doing them although a case was only brought against the one hospital.¹⁵³ The broker of the deal charged ‘a fee of between

¹⁴⁸ Frankel op cit note 12 at 59.

¹⁴⁹ International Center for Research on Women New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs 2007 at 46 available at http://lastradainternational.org/lisidocs/icrw_child_marriage_0607.pdf, accessed on 3 April 2019 at 46.

¹⁵⁰ Tsireledzani op cit note 120 at 18.

¹⁵¹ Jean Allain ‘Trafficking of persons for the removal of organs and the admission of guilt of a South African hospital’ (2011) 19 *Medical Law Review* 117 at 117.

¹⁵² *Ziegler v State* Case No: 41/1816/2010.

¹⁵³ Allain op cit note 151 at 122.

US\$100 000 and \$120 000 for recipients and paid the original suppliers of kidneys \$20 000, though later, the Romanians and Brazilians received on average \$6 000,¹⁵⁴ hospital staff were also paid for the roles they played. The broker was exposed as Ilan Perry, an Israeli who heads up an international organised crime syndicate.¹⁵⁵

Africans have for centuries relied on traditional healers and sangomas for their health and wellbeing. Traditional healers typically use herbs and plants for traditional medicine or *muti* alongside of working with dreams and visions. The relative inaccessibility of public healthcare up until very recently means that traditional medicine is widely used in rural areas. The dark side of traditional medicine lies in adding body parts to the herbal mixtures, using the medicine to take revenge, hurt or manipulate another or to achieve good health, success, love or money. Some people believe that the addition of animal and or human body parts will increase the potency of traditional medicine, which increases the demand for human body parts.¹⁵⁶ It is believed that the parts are most potent if they are retrieved from a living body. The body parts are acquired by cutting them out of the body often the person is still alive and bleeds to death although there are people who survived the ordeal. This is known as ‘*muti* killing’. There have been a number of arrests for the maiming and killing of people for the purposes of using their body parts for *muti*, the victims in these cases were not necessarily trafficked. Prosecutions are unsuccessful when people are found with body parts but there is no maimed body. A study investigating *muti*-killings found well established transnational trade in body parts between South Africa and Mozambique.¹⁵⁷ In the case of *Mogaramedi v State* he had deceived his sister into travelling to his home. While she slept, he

hit her twice on her head with an axe and stabbed her underneath the left breast until she died. After waiting for the deceased to die he returned and cut off the private parts.¹⁵⁸

Mogaramedi had been in training and practicing as a sangoma for ten years and committed this crime as he needed a ‘genital organ of a close female relative’ to complete his initiation.¹⁵⁹

¹⁵⁴ Allain op cit note 151 at 118.

¹⁵⁵ Susanne Lundin *Organs for Sale: An Ethnographic Examination of the International Organ Trade The Syndicate in South Africa* (2016) at 75.

¹⁵⁶ Kruger op cit note 44 at 53.

¹⁵⁷ Liga Moçambicana dos Direitos Humanos ‘Trafficking body parts in Mozambique and South Africa’ (2008) at 46.

¹⁵⁸ *Mogaramedi v State* Judgment in High court of South Africa (Gauteng Division, Pretoria) Case Number: A 165/2013 at para 33.

¹⁵⁹ *Supra* at 4.

The accused unsuccessfully appealed his sentence. The PCTP was not yet enforced at the time of the trial, so he was found guilty of violating the Criminal Law Amendment Act and sentenced to life imprisonment. He lodged an unsuccessful appeal against the sentence in 2014. J Dosia affirmed ‘The Supreme Court of Appeal has taken a harsher stance towards appellants who killed to obtain body parts for *muti* related purposes.’¹⁶⁰

3.8 Conclusion

The different forms of exploitation experienced in human trafficking and how they happen, the peculiarities were elaborated on in this chapter namely, child trafficking, debt bondage, commercial sexual exploitation, non-sexual labour, forced marriage, removal of body parts and adoption. A brief description of traffickers was posited.

¹⁶⁰ Mogaramedi supra note 158 at para 29.

CHAPTER 4 INTERNATIONAL LAW AND POLICY

‘Trafficking goes to the very heart of what human rights law is trying to prevent.’¹⁶¹ Notably the Palermo Protocol provides for the human rights of victims of trafficking to be upheld within the criminal justice process thus trafficking legislation should take into account the international human rights instruments. The human rights system has over decades established an extensive human rights corpus to promote and protect human rights for all, to prevent human rights violations and to clearly identify the obligations and duties of state actors and non-state actors. This chapter outlines the international and regional legal framework and identifies a number of treaties, protocols and policy guidelines, highlighting their relevance to trafficking in persons and to the South African context.

4.1 International Law

United Nations Universal Declaration of Human Rights (UDHR)¹⁶²

UDHR is a non-binding instrument. It was a historic declaration of fundamental human rights which the human rights corpus is built on.

UDHR declares the following rights for all human beings: freedom, equality and dignity; non-discrimination; an end to ‘slavery and the slave trade’; ‘social security’ and ‘economic, social and cultural rights’; ‘work’ ‘equal pay for equal work’; ‘to form and to join trade unions’; ‘rest and leisure’; ‘a standard of living adequate for the health and well-being of himself and of his family’ as well as the right to social protection and special care and assistance to mothers and children.¹⁶³

The UDHR contains the most basic human rights, beginning with the rights to freedom, equality, dignity and non-discrimination. These rights protect the individual from violation by the state and are political, economic and social in nature. The rights have since been strengthened by provisions and elaboration contained in the binding human rights treaties flowing from the UDHR.

¹⁶¹ Gallagher op cit note 11 at 5.

¹⁶² UN General Assembly ‘Universal Declaration of Human Rights’ 10 December 1948 217 A(III) available at <https://www.refworld.org/docid/3ae6b3712c.html>, accessed 14 October 2019.

¹⁶³ Supra at 1, 2, 4, 22, 23, 24, 25.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention)¹⁶⁴

The 1949 Convention replaced earlier conventions and covers women and men, its trafficking focus was narrow, solely on prostitution. The 1949 Convention aimed to prohibit and control the (undefined) practices of trafficking, procurement, and exploitation, whether internal or cross-border, and irrespective of the victim's age or consent'.¹⁶⁵ Prostitution itself is not prohibited and states are not called upon to legislate against it.¹⁶⁶ It makes provision for a range of procedures including prosecution, 'centralisation of antitrafficking efforts', protection of victims, care and support to victims, 'rehabilitation and social adjustment' of victims including those who will be repatriated.¹⁶⁷

The treaty continued to be ratified even in 2000s by seven new States Parties. Nonetheless the convention has been strongly critiqued for having a limited understanding of sexual exploitation and not differentiating between 'consensual and forced prostitution'.¹⁶⁸ The strong moral response to prostitution still comes through in the convention which has led to the contentions that women's rights and agency are disregarded, it perpetuates the idea of women as quintessential victims and fails to connect gender inequality with prostitution.

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)¹⁶⁹

The convention and protocol apply *mutatis mutandis*.¹⁷⁰ The convention aims to facilitate international cooperation by states in cross-border organised crime. It obligates States Parties to deal with serious crimes by criminalising: being part of an organised crime organisation, laundering of the proceeds of crime and corruption in the public sector and obstruction of justice in their jurisdiction.¹⁷¹

¹⁶⁴ UN General Assembly 'Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others' 2 December 1949 A/RES/317 available at <https://www.refworld.org/docid/3ae6b38e23.html>, accessed 14 October 2019.

¹⁶⁵ Gallagher op cit note 11 at 59.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid at 60.

¹⁶⁸ Ibid at 61.

¹⁶⁹ *Palermo Protocol* supra note 1.

¹⁷⁰ *Palermo Protocol* supra note 1 art 1.

¹⁷¹ *UNTOC* supra articles 5, 6, 8, 23.

The convention makes provision for law enforcement measures to prevent trafficking and migrant smuggling.

The Palermo Protocol is the guiding document for international law on counter-human trafficking. Article 3 provides a comprehensive definition of human trafficking as defined in chapter two above. The protocol obliges each state party to ‘adopt such legislative and other measures’ to criminalise human trafficking.¹⁷²

The protection of victims of trafficking is provided for and focusses on assistance with court procedures, compensation, status of victims in the country they are found in and reparations. This includes states considering measures for ‘physical, psychological and social recovery of victims’ including counselling, housing, medical, psychological, employment and education and training.¹⁷³ Article 6 makes further provision for survivors ‘views and concerns to be presented and considered at appropriate stages of criminal proceedings’.¹⁷⁴ It further allows for States Parties to consider legislation or other appropriate measures which allow victims of trafficking in persons the opportunity to remain within the state.¹⁷⁵

The language used in some of the clauses weakens the clauses as they soften the states obligations.¹⁷⁶

Article 9 provides for the prevention of trafficking in persons with a focus on establishing policies, programmes, research, media campaigns and other measures including protection of ‘especially women and children, from revictimization’ and commitment to strengthen ‘bilateral or multilateral cooperation’.

States Parties shall take or strengthen measures... to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.¹⁷⁷

The Palermo Protocol provides for cooperation between relevant authorities, domestic and international as well as with non-government organisations for information exchange and border control. Training of relevant authorities should encompass prevention, prosecution and protection measures including ‘human rights and child- and gender-sensitive issues’.¹⁷⁸

¹⁷² *Palermo Protocol* supra note 1 at art 5.

¹⁷³ Supra at 6.

¹⁷⁴ Supra at art 6.3.

¹⁷⁵ Supra at art 6, 7, 8.

¹⁷⁶ Supra at art 6.2, .6.4, 6.6.

¹⁷⁷ Supra at art 9.4.

¹⁷⁸ Supra at art 9, 10.

Border measures, security and control of documents are provided for in articles 11 and 12 these are aimed at detecting trafficking without infringing on free movement through borders as per international relations. The ‘integrity and security of travel documents’ issued by States are emphasised to avoid easy replication and abuse.

Provisions are made for legislation to ensure commercial carriers and transport enterprises can be held liable if they are part of trafficking ventures.¹⁷⁹ Article 13 makes provision for states to confirm the legitimacy and validity of documents upon request of another state.

The Palermo Protocol emphasises criminal law measures, which are necessary but remain one part of the solution to the human trafficking problem. The protocol makes brief reference to undefined measures that should be taken to attend to ‘poverty, underdevelopment and lack of equal opportunity’ as factors that cause vulnerability.¹⁸⁰ The Palermo Protocol fails to make provision for the eradication of the ‘root causes and systemic issues’.¹⁸¹ The factors that make children and women vulnerable to trafficking including gender-based discrimination are not given specific attention in the protocol. The provisions for information exchange and training, law enforcement, criminalisation and border measures on the other hand are detailed. ‘[T]o make progress in combating human trafficking, they must confront the root causes of this vulnerability.’¹⁸² States are not required to consider measures that may shift the economy away from the demand for cheap labour, yet so much of trafficking exploitation is about forced labour. The commoditization of humans, the free market and consumers’ demands for cheap goods and services are also not addressed as part of the solution.

The document itself is named highlighting women and girls this sets the tone for the document which does not acknowledge that boys and men are also trafficked, for exploitation in both sex trafficking and labour trafficking. How will this be eradicated if it is barely acknowledged.

International Covenant on Civil and Political Rights (ICCPR)¹⁸³

The ICCPR is the leading human rights instrument on civil and political rights and remains vital to ensuring freedom, equality and justice. It contains provisions for the following non-derogable rights: the right to life; to not be tortured or subjected to cruel, inhuman or degrading

¹⁷⁹ *Palermo Protocol* supra note 1 at art 11.

¹⁸⁰ *Supra* at art 9.4.

¹⁸¹ *Todres op cit* note 89 at 58.

¹⁸² *Todres op cit* note 89 at 59.

¹⁸³ *ICCPR* supra note 34.

treatment or punishment; the right to freedom to not be held in slavery or servitude or the right to work and to not to be forced to work.¹⁸⁴

Articles 6, 7, 8 are also peremptory norms of customary international law. They have *jus cogens* status and are expressed in absolute terms and therefore may have no limitations placed on them and cannot be suspended not even temporarily under a state of emergency.¹⁸⁵

Although this is written in black and white and all countries support the realisation of these rights they continue to be violated daily on a massive scale. Non-derogable rights are violated in the human trafficking process. In some cases, the rights violations are the precise motivation for the trafficking, for example exploitation for the purposes of forced labour, servitude, slavery or forced marriage are direct intentional rights violations. Trafficked persons receive degrading treatment, in the case of sexual exploitation this serves to break their spirit and keep them in subjugation. Trafficking for forced labour, is generally a method used by employers to reduce labour costs and avoid adherence to statutory and regulatory requirements, inhuman and degrading treatment is the result. This is but one illustration that the solution to the problem of human trafficking is multifaceted.

The ICCPR obliges States Parties ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights in the present Covenant without distinction’.¹⁸⁶ It makes provision for the equal right of men and women; ‘liberty and security of person’; liberty of movement including that ‘[e]veryone shall be free to leave any country’ and ‘no marriage shall be entered into without the free full consent of the intending spouses’.¹⁸⁷ The ICCPR provides for all to be ‘equal before the courts and tribunals’ and the right to be ‘equal before the law and equal protection of the law’.¹⁸⁸

The ICCPR is emphatic and clear on the equality of all people and non-discrimination, nonetheless, as explained above, women, children and migrants are frequently discriminated against and are vulnerable populations most likely to be trafficked. Trafficking typically violates liberty, security of person and freedom of movement, through forceful or deceitful means of relocating someone and restricting their movement at the destination point. The ICCPR clearly states that forced marriage should not be practiced, this supports the call for an

¹⁸⁴ ICCPR supra note 34 at art 6, 7, 8.

¹⁸⁵ Alex Conte & Richard Burchell ‘Limitations to and derogations from covenant rights’ in Alex Conte & Richard Burchill (eds) *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 2 ed (2009) 39 at 41.

¹⁸⁶ ICCPR supra note 34 at art 2.

¹⁸⁷ Supra at art 3, 9, 12, 23.

¹⁸⁸ Supra at art 14, 26.

end to forced marriage which is also a form of trafficking. Equality before the law and protection by the law are important principles to ensure legislation that is just and protects victims of trafficking.

International Covenant on Economic Social and Cultural Rights (ICESCR)¹⁸⁹

The normative content of ICESCR addresses the social, economic and cultural conditions that allow for the flourishing and healthy development of a human being. Public policy strongly influences the extent to which the rights enshrined in the ICESCR are delivered.

The preamble recognises that ‘freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.’¹⁹⁰

The ICESCR obliges States to take steps to ‘achieving progressively the full realisation of rights’.¹⁹¹ It binds States Parties to ensure that all people enjoy ‘economic, social and cultural rights’.¹⁹² It provides for ‘just and favourable’ working conditions encompassing the ‘right to work’ and for people to choose the work they wish to do and for the state to ‘safeguard this right’. It provides for ‘safe and healthy’ working conditions, for everyone ‘in particular women’ to receive ‘equal pay for equal work’ and for ‘rest, leisure and reasonable limitation of work hours’.¹⁹³ ICESCR stipulates a right to ‘social security’.¹⁹⁴ The ICESCR makes provision for ‘protection and assistance for the family’ and continues ‘[m]arriage must be entered into with the free consent of the intending spouses’.¹⁹⁵ The ICESCR stipulates special protection for working pregnant mothers. ICESCR makes provision that ‘[c]hildren and young persons should be protected from economic and social exploitation’ and harmful work. It further provides for States to ‘set age limits below which the paid employment of child labour should be prohibited and punishable by law’.¹⁹⁶ ICESCR provides for ‘an adequate standard of living’ including ‘adequate food, clothing and housing and to the continuous improvement

¹⁸⁹ UN General Assembly ‘International Covenant on Economic, Social and Cultural Rights’ 16 December 1966 United Nations Treaty Series vol 993 p3 available at <https://www.refworld.org/docid/3ae6b36c0.html>, accessed 14 October 2019; SA signed and ratified 2015.

¹⁹⁰ Supra at preamble.

¹⁹¹ Supra at art 2.

¹⁹² Supra at art 3.

¹⁹³ Supra at art 6, 7.

¹⁹⁴ Supra at art 9.

¹⁹⁵ Supra at art 10.

¹⁹⁶ Supra at art 10.

of living conditions.’¹⁹⁷ The ICESCR binds States Parties to recognise the right ‘to the highest attainable standard of physical and mental health’ and the ‘right to education.’¹⁹⁸

The rights enshrined in these provisions are amongst the human rights violations that occur during trafficking especially rights relating to work and working conditions. If States Parties invested more in protection of these rights, particularly in relation to working conditions, trafficking for forced labour would be much less widespread. Rehman argues that the realisation of the rights enshrined in the ICESCR is hampered by the idea of the ‘superiority of rights’. The mere notion that some rights are more important than others has ‘led to gross violations and neglect of economic and social rights’¹⁹⁹ He continues to critique the idea of ‘progressive achievement’ of ICESCR rights which implies that these rights are not as easily attainable and requires state interventions and thus these rights are seen as positive rights.²⁰⁰ The realisation of the rights to food, clothing, housing, standard of living and living conditions would eliminate the conditions that make people vulnerable to traffickers.

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)²⁰¹

CEDAW is an international human rights treaty focussed on women’s rights. CEDAW’s normative content is aimed at ending discrimination against women and reflects the principles of non-discrimination, substantive equality and state obligations.

The CEDAW preamble is

[c]oncerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs ... and [e]mphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

CEDAW makes provision for States Parties to condemn discrimination against women’ and ‘to embody the principle of equality of men and women’. States Parties are obligated to take both positive and negative measures to adopt appropriate legislation and to establish legal protections for women’s rights; and modify or abolish existing discriminatory laws, customs and practices.²⁰²

¹⁹⁷ *ICESCR* supra note 189 at art 11.

¹⁹⁸ *Supra* at art 12, 13.

¹⁹⁹ Rehman op cit note 31 at 105.

²⁰⁰ *Ibid* at 106.

²⁰¹ *CEDAW* supra note 33.

²⁰² *Supra* at art 2.

States Parties are bound to take ‘all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’²⁰³ CEDAW addresses discrimination against women in the workplace and binds states to take all appropriate measures to eradicate it, specific mention is made of ‘the right to work as an inalienable right of all human beings’; ‘the right to free choice of profession and employment’, ‘right to social security’ and ‘protection of health and to safety ... including the safeguarding of the function of reproduction’.²⁰⁴

CEDAW makes provision for women to access healthcare services freely with ‘appropriate services.... during pregnancy, confinement and post-natal period’.²⁰⁵ CEDAW provides for ‘the particular problems faced by rural women and the significant roles which rural women play’ and binds States Parties to ‘take all appropriate measures to eliminate discrimination against women in rural areas’.²⁰⁶ CEDAW binds States Parties to treat men and women equally before the law; and any contract that restricts the legal capacity of women, including private agreements as null and void.²⁰⁷ CEDAW provides for men and women to have the same rights in marriage and States Parties are obligated to ‘take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations’ and the ‘betrothal or marriage of a child shall have no legal effect’.²⁰⁸

Article 6 is a key clause for the focus of this thesis. It does not define ‘all forms of traffic in women’ and fails to clarify ‘exploitation of the prostitution of women’, it is argued that the latter can be seen as a step away from the earlier abolitionist approach taken. Soft language is used, ‘appropriate measures’ and does not commit states to any specific actions.²⁰⁹ CEDAW directs specific application in respect of women and the law, nationality, workplace, health care, rural women and marriage. The right of a woman to choose whom she marries is once again stated unequivocally, as entrenched in the ICCPR and ICESCR.

The articles noted above provide a clear statement on the elimination of discrimination against women in all its forms, thus leaving no room for any justification of unequal or ill-treatment of a woman. States Parties are obligated in most instances to take positive and negative measures to eliminate the discrimination and ensure equality between men and women.

²⁰³ CEDAW supra note 33 at art 6.

²⁰⁴ Supra at art 11.

²⁰⁵ Supra at art 12.

²⁰⁶ Supra at art 14.

²⁰⁷ Supra at art 15.

²⁰⁸ Supra at art 16.

²⁰⁹ Gallagher op cit note 11 at 64.

Convention on the Rights of the Child (CRC)

CRC is the convention with the highest number of signatories, ratified by 196 States Parties.²¹⁰

The four pillars of the CRC are non-discrimination ‘best interests of the child shall be a primary consideration’, ‘right to life ... survival and development’ and right to be heard.²¹¹ The four pillars are essential for the realisation of children’s rights.²¹²

The CRC makes provision

With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.²¹³

Provisions are made for registration, nationality family reunification and ‘to combat the illicit transfer of children abroad’.²¹⁴ The CRC makes provision for no ‘arbitrary or unlawful interference’ with a child and the right to protection should this occur.²¹⁵ The CRC imposes an obligation on States Parties to take protection measures to ‘protect the child from all forms of physical or mental violence’ encompassing ‘legislative, administrative, social and educational measures’ and ‘social programmes’.²¹⁶ States Parties are obligated to abolish ‘traditional practices prejudicial to the health of children’.²¹⁷ Provisions for the child’s right to education, ‘to rest and leisure’, ‘to be protected from economic exploitation ... and work ... harmful to the child's health or physical, mental, spiritual, moral or social development’ are all enshrined in the treaty.²¹⁸ The CRC provides for the child to be protected ‘from all forms of sexual exploitation and sexual abuse’ and ‘all other forms of exploitation’.²¹⁹ States Parties are obligated to take national, bilateral and multilateral measures to prevent the exploitation of children in prostitution, pornography and any unlawful sexual activity or practices. This includes ‘the abduction of, the sale of or traffic in children for any purpose or in any form’.²²⁰

²¹⁰ UN General Assembly ‘Convention on the Rights of the Child’ 20 November 1989 United Nations Treaty Series vol 1577 p3 available at <https://www.refworld.org/docid/3ae6b38f0.html>, accessed 14 October 2019; SA signed in 1993 and ratified 1995.

²¹¹ Benyam D Memzur ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (2008) 23 *SAPR/Public Law* 1 at 4; *CRC* supra note 210 at art 2, 3, 6, 12.

²¹² Kilkelly, Ursula ‘Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance’ in Antonella Invernizzi & Jane Williams, J (eds) *The Human Rights of Children from Visions to Implementation* (2011) 181 at 181.

²¹³ *CRC* supra note 210 at art 4.

²¹⁴ *Supra* at art 7, 10, 11.

²¹⁵ *Supra* at art 16.

²¹⁶ *Supra* at art 19.

²¹⁷ *Supra* at 24.

²¹⁸ *Supra* at art 28, 31, 32.

²¹⁹ *Supra* at art 34, 36.

²²⁰ *Supra* at art 34, 35.

The treaty makes provision for children subjected to ‘torture or other cruel, inhuman or degrading treatment or punishment’, affected by armed conflict or deprived of their liberty to have ‘access to legal and other assistance’.²²¹

The CRC binds States Parties to take positive measures noting
recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.²²²

The CRC provides a comprehensive framework for the protection of the rights and dignity of children and thus should be seen as fully relevant for addressing the trafficking of children.²²³

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography CRC-OPSC²²⁴

CRC-OPSC specifically addresses the commercial sexual exploitation of children and includes child trafficking. The four pillars of the CRC pertain to the application of this human rights instrument.

The CRC-OPSC defines and prohibits the sale of children, child prostitution and child pornography.²²⁵ States Parties are obligated to criminalise and legislate against these offences.²²⁶ The CRC-OPSC makes provision for the protection of the rights and interests of child victims and witnesses with stipulated obligations.²²⁷ Preventative measures and international cooperation are provided for.²²⁸

The CRC-OPSC obligates all signatory states to treat the acts of sale of children, child prostitution and child pornography as crimes, to prevent the crimes, to protect children from being sold, prostituted or exploited in pornography, to provide support to the child victims and to cooperate internationally as needed. The preamble recognises that international child trafficking contributes to the need for the CRC-OPSC although it does not explicitly address it.

²²¹ Supra at art 37, 38.

²²² CRC supra note 210 at art 39.

²²³ Gallagher op cit note 11 at 65.

²²⁴ UN General Assembly ‘Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography’ 16 March 2001 A/RES/54/263 available at <https://www.refworld.org/docid/3ae6b38bc.html>, accessed 14 October 2019; SA signed and ratified in 2003.

²²⁵ Supra at art 1, 2.

²²⁶ Supra at art 3.

²²⁷ Supra at art 8, 9.

²²⁸ Supra at art 9, 5, 6, 10.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OPAC)²²⁹

The CRC-OPAC aims to protect children from being recruited into armed groups and engaged in hostilities. It is applicable to the exploitation of children as child soldiers.

The CRC-OPAC protects persons under 18 years old from participating in hostilities as part of states armed forces or armed groups. This has not eliminated the continued use of child soldiers.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²³⁰

CAT prohibits torture which is a fundamental principle in international human rights law. The treaty is unequivocal in obligating states parties to prevent and examine complaints of torture, cruel, inhuman or degrading treatment or punishment.

CAT provides a definition of torture and for the prevention of torture and ‘acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture’.²³¹ CAT upholds the principle of *refoulement*.²³² Provision is made for the protection of victims of torture and for their access to justice and the swift administration of justice with ‘prompt and impartial examination’.²³³ CAT provides for redress, fair and adequate compensation for victims and their dependants in the event of death.²³⁴

International law has established the prohibition of torture as a peremptory norm through its incorporation in a number of human rights treaties. This treaty is significant as it offers a definition of torture and clearly states that there is no instance when torture is justifiable, thus underscoring it as a non-derogable right. It does however limit torture, by defining it as an act performed by ‘a public official or other person acting in an official capacity’.²³⁵ Freedom from torture is seen as an absolute right however the limitations of the definition means that many victims of trafficking who experience torture, cruel inhuman or degrading treatment cannot claim to be torture victims.

²²⁹ UN General Assembly ‘Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict’ 25 May 2000 A/RES/54/263 available at <https://www.refworld.org/docid/47fdfb180.html>, accessed 14 October 2019; SA signed and ratified 2009.

²³⁰ UN General Assembly ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ 10 December 1984 United Nations Treaty Series vol 1465 p85 available at <https://www.refworld.org/docid/3ae6b3a94.html>, accessed 14 October 2019; SA signed and ratified 1998.

²³¹ *Supra* at art 1, 16.

²³² *Supra* at art 3.

²³³ *Supra* at art 13.

²³⁴ *Supra* at art 14.

²³⁵ *Supra* at art 1.

The definition includes the intention to inflict pain or suffering which excludes cases where pain and suffering occur as a consequence or accidentally. A second limitation is that the purpose of torture must be for particular objectives like information. This then raises the question, how are the many cases of torture which do not fit these parameters dealt with and taken into account?

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)²³⁶

ICERD focusses on practical measures for the elimination of all forms of discrimination based on race, colour, descent, or national or ethnic origin to realise the principle of all people are equal.

ICERD article 2 provides for States Parties to take positive and negative measures to eliminate ‘racial discrimination in all its forms’ and to promote ‘understanding among all races’. Article 5 requires ‘states parties undertake to prohibit and to eliminate racial discrimination in all its forms’ to enable the enjoyment of basic human rights by all persons. Article 6 obligates States Parties to make provision for protection from racial discrimination and to put remedies in place through the establishment of statutory institutions that respond to human rights violations, promote fundamental freedoms and basic human rights and can make reparations when rights violations occur.²³⁷

The human rights instruments discussed can play a critical role in the prevention of human trafficking and in protection and support of human trafficking victims.

International Labour Organisation Conventions

The International Labour Organisation (ILO) through its Conventions prohibits child labour and forced labour and places obligations on States Parties to eliminate all forms thereof. The exploitation of children in the form of child labour is a common purpose of human trafficking.

Forced Labour Convention, 1930 (No. 29)²³⁸ provides for the ‘suppression of forced or compulsory labour’ and defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.²³⁹ The Abolition of Forced Labour Convention, 1957 (No. 105)²⁴⁰ strengthened the efforts to eliminate slave-like working conditions with the

²³⁶ ICERD supra note 32.

²³⁷ ICERD supra note 32 art 2, 5, 6.

²³⁸ International Labour Organization (ILO) ‘Forced Labour Convention C29’ 28 June 1930 C29 available at <https://www.refworld.org/docid/3ddb621f2a.html>, accessed 14 October 2019.

²³⁹ Supra at art 1, 2.

²⁴⁰ International Labour Organization (ILO) ‘Abolition of Forced Labour Convention C105’ 25 June 1957 C105 available at <https://www.refworld.org/docid/43fdeb602.html>, accessed 14 October 2019; SA signed and ratified 1997.

abolition of forced or compulsory labour. The Minimum Age Convention, 1973 (No. 138)²⁴¹ abolishes child labour and sets the minimum age for entering the work force at 15 years old.²⁴²

The persistence of the exploitation of child labour led to the Worst Forms of Child Labour Convention, (WFCL) 1999 (No. 182)²⁴³ which prioritises the ‘prohibition and immediate action for the elimination of the worst forms of child labour’. The WFCL is the most significant of this cluster of instruments as it begins to assert positive measures. Article 2 defines child as ‘all persons under the age of 18.’ States are obligated to eliminate WFCL which is defined as follows.

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) ...child for prostitution, for the production of pornography...
- (c) ... illicit activities, ... production and trafficking of drugs...
- (d) work likely to harm the health, safety or morals of children.²⁴⁴

States are obligated to take positive and negative measures to monitor implementation of WFCL; to establish prevention programmes as a priority; to ensure access to free basic education and as appropriate vocational training for children removed from WFCL; to remove children from WFCL; to assist with their rehabilitation and social integration and to remain cognisant of the girl-child.²⁴⁵

Article 8 provides for ‘enhanced international cooperation... poverty eradication programmes and universal education’ amongst member states.

The ILO Conventions set important parameters for the protection of children against child labour and child trafficking. The WFCL recognises that children fall victim to trafficking and prohibits the sale and trafficking of children it also makes provision for child prostitution and the production of pornography in its definition of worst forms of child labour. States are obligated to be responsive and put programmes in place to remove children from situations of worst forms of child labour, which will at times be situations where children were trafficked.

²⁴¹ International Labour Organisation (ILO) ‘Minimum Age Convention C138’ 26 June 1973 C138 available at <https://www.refworld.org/docid/421216a34.html>, accessed 14 October 2019; SA signed and ratified 2000.

²⁴² Supra at art 1, 2.

²⁴³ International Labour Organization (ILO) ‘Worst Forms of Child Labour Convention C182’ 17 June 1999 C182, available at <https://www.refworld.org/docid/3ddb6e0c4.html>, accessed 14 October 2019; SA signed and ratified 2000.

²⁴⁴ Supra at art 3.

²⁴⁵ Supra at art 5, 6, 7.

Furthermore, States Parties are obligated to support removed children with rehabilitation and social integration.

Domestic Workers Convention, ILO (No. 189)²⁴⁶ is concerned with decent work for domestic workers and offers protection to Domestic Workers by ensuring labour rights, safety and positive measures that States Parties should take.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)²⁴⁷

CMW protects the rights of migrant workers and their families and protects them from exploitation. States Parties are obligated to promote ‘sound, equitable and humane conditions’²⁴⁸ for migrant workers. South Africa has not signed nor ratified this treaty. It leaves already vulnerable migrant workers with limited protections and increased exposure to exploitation.

Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Smuggling Migrants Protocol)²⁴⁹

The Smuggling Migrants Protocol’s purpose is threefold to prevent and combat the smuggling of migrants, to promote cooperation between States Parties and to protect smuggled migrants. Emphasis is placed on the actions of smuggling by land, sea or air.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (The Supplementary Convention)²⁵⁰

The Supplementary Convention supplements the 1926 Slavery Convention and its Amendment. The Supplementary Convention does not specifically mention human trafficking, though it does criminalise the slave trade and

²⁴⁶ ‘Convention Concerning Decent Work for Domestic Workers’ 16 June 2011 PRNo 15A available at <https://www.refworld.org/docid/4e0d784e2.html>, accessed 14 October 2019; SA signed and ratified 2013.

²⁴⁷ UN General Assembly ‘International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’ 18 December 1990 A/RES/45/158 available at <https://www.refworld.org/docid/3ae6b3980.html>, accessed 14 October 2019.

²⁴⁸ Supra at art 64.

²⁴⁹ UN General Assembly ‘Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime’ 15 November 2000 available at <https://www.refworld.org/docid/479dee062.html>, accessed 14 October 2019; SA signed and ratified 2000.

²⁵⁰ UN Economic and Social Council (ECOSOC) ‘Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery’ 7 September 1956 available at <https://www.refworld.org/docid/58c156dc4.html>, accessed 14 October 2019.

institutions and practices similar to slavery: serfdom, debt bondage (also known as ‘bonded labour’: the practice of requiring someone to work to pay off a loan when the value of their work greatly exceeds the value of the loan), servile marriage and the transfer of children for exploitation by third parties.²⁵¹

Convention relating to the Status of Refugees (Geneva Convention)²⁵²

The Geneva Convention is concerned with the status of refugees and their access to basic human rights, non-discrimination, non-penalisation and non-refoulement are the three foundational principles of the convention.

Convention on the Rights of Persons with Disabilities (CRPD)²⁵³

CRPD is concerned about the dignity of persons with disabilities and obligates States Parties to take negative and positive measures to promote and protect their rights.

United Nations Convention against Corruption (UNCAC)²⁵⁴

The UNCAC provides for the prevention and combatting of corruption, organised crime and economic crime transnationally with emphasis on public affairs and property.

4.2 Regional Human Rights Instruments

The Palermo Protocol provisions are reiterated and strengthened in regional treaties including the Council of Europe’s Convention on Action against Trafficking in Human Beings; The South Asian Association of Regional Cooperation’s Convention on Preventing and Combating Trafficking in Women and Children for Prostitution; the Organisation of American States’ Inter-American Convention on International Traffic in Minors and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and in the African Union’s (AU) African Charter on Human and Peoples’ Rights. In addition, the AU specifically addressed trafficking and regional specificities in its charters concerned with children and women’s rights.

²⁵¹ Supra at art 1.

²⁵² UN General Assembly ‘Convention relating to the Status of Refugees’ 28 July 1951 United Nations Treaty Series vol 189 p137 available at <https://www.refworld.org/docid/3b01b964.html>, accessed 14 October 2019; SA signed and ratified 1996.

²⁵³ UN General Assembly ‘Convention on the Rights of Persons with Disabilities’ resolution / adopted by the General Assembly 24 January 2007 A/RES/61/106 available at <https://www.refworld.org/docid/45f973632.html> accessed 14 October 2019; SA signed and ratified 2007.

²⁵⁴ UN General Assembly ‘United Nations Convention Against Corruption’ 31 October 2003 A/58/422 available at <https://www.refworld.org/docid/4374b9524.html>, accessed 25 October 2019; SA signed in 1993 and ratified 1995.

African Charter on the Rights and Welfare of the Child (ACRWC)²⁵⁵

The ACRWC seeks to protect and promote the rights of the child and sets out state obligations to prevent violations of the child including through child labour²⁵⁶ and sexual exploitation.²⁵⁷

Article 29.1 obligates States Parties to prevent:

the abduction, sale of, or traffick in children for any purpose or in any form, by any person including parents or legal guardians of the child;

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol)²⁵⁸

The Maputo Protocol sets the standard for women's human rights in Africa, it obliges States Parties to combat 'all forms of discrimination against women through taking appropriate legislative, institutional and other measures' and to take positive measures for the prevention, protection and promotion of women's human rights.²⁵⁹

The Maputo Protocol makes provision for human trafficking

every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.²⁶⁰

States Parties shall take appropriate measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.²⁶¹

The Maputo Protocol contains a number of articles which address the regional specificities and the many human rights that may be violated in the process of human trafficking encompassing female genital mutilation, forced marriage, 18 minimum age for marriage, sexual violence against women in armed conflicts, child soldiers.²⁶²

²⁵⁵ Organisation of African Unity (OAU) 'African Charter on the Rights and Welfare of the Child' 11 July 1990 CAB/LEG/24.9/49 (1990) available at <https://www.refworld.org/docid/3ae6b38c18.html>, accessed 14 October 2019; Ratified by SA 2000.

²⁵⁶ ACRWC supra note 255 at art 15.

²⁵⁷ Supra at art 27.

²⁵⁸ African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 11 July 2003 available at <https://www.refworld.org/docid/3f4b139d4.html>, accessed 14 October 2019; Ratified by SA 2005.

²⁵⁹ Supra at art 2(1).

²⁶⁰ Supra at art 4(1).

²⁶¹ Supra at art 4(2)(g).

²⁶² Supra at 5(b), 6(a), 6(b), 11(3), 11(4).

The Southern African Development Community (SADC) Protocol on Extradition²⁶³ and its Protocol on Mutual Legal Assistance in Criminal Matters²⁶⁴ supports regional cooperation in investigations and prosecutions.

4.3 Soft Law

Soft Law remains an imperative element of the human trafficking international legal framework. Three instruments which have broad scope and relevance to trafficking and guide standards on the administration of criminal justice and assistance and treatment of victims are: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,²⁶⁵ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime²⁶⁶ and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²⁶⁷

Vienna Declaration and Programme of Action - World Conference on Human Rights (World Conference on Human Rights)²⁶⁸

States reaffirmed their commitment to honour their obligations and ensure the enjoyment of human rights by all at the World Conference on Human Rights, as written into the human rights instruments and international law. The girl-child and women's rights were declared equal on the same footing as provision was made for

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights... Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice

²⁶³ 'SADC Protocol on Extradition' adopted by SADC Heads of State in Luanda on 03 October 2002 available at https://www.sadc.int/files/3513/5292/8371/Protocol_on_Extradition.pdf, accessed 14 October 2019.

²⁶⁴ 'SADC Protocol on Mutual Legal Assistance in Criminal Matters' adopted by SADC Heads of State in Luanda on 03 October 2002 available at [https://www.sadc.int/documents-publications/show/Protocol%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20\(2002\)](https://www.sadc.int/documents-publications/show/Protocol%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20(2002)), accessed 14 October 2019.

²⁶⁵ UN General Assembly 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' resolution / adopted by the General Assembly 29 November 1985 A/RES/40/34 available at <https://www.refworld.org/docid/3b00f2275b.html>, accessed 14 October 2019.

²⁶⁶ UN Economic and Social Council (ECOSOC) 'UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime' 22 July 2005 E/RES/2005/20 available at <https://www.refworld.org/docid/468922c92.html>, accessed 14 October 2019.

²⁶⁷ UN General Assembly 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' resolution / adopted by the General Assembly 21 March 2006 A/RES/60/147 available at <https://www.refworld.org/docid/4721cb942.html>, accessed 14 October 2019.

²⁶⁸ UN General Assembly Vienna Declaration and Programme of Action' 12 July 1993 A/CONF.157/23 available at <https://www.refworld.org/docid/3ae6b39ec.html>, accessed 14 October 2019.

and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.²⁶⁹

The World Conference on Human Rights supported the appointment of a Special Rapporteur on violence against women, its causes and consequences by the Commission on Human Rights.²⁷⁰

Women's human rights were acknowledged after decades of silence and a general neglect of ensuring that women's human rights are protected and attained.

Declaration on the Elimination of Violence against Women (DEVAW)²⁷¹

DEVAW's signatories defined violence against women as discrimination in private and public whether it is physical, sexual or psychological violence. They agreed to exercise due diligence to act to eliminate such violence and realise women's 'equal enjoyment and protection of all human rights and fundamental freedoms'.²⁷²

DEVAW provides for States to eliminate violence against women completely and not justify actions as custom, tradition or religious. States Parties are to 'exercise due diligence standards, to prevent, investigate and, in accordance with national legislation, punish acts of violence against women'.²⁷³

Beijing Declaration and Platform for Action, Fourth World Conference on Women (Beijing Conference)²⁷⁴

The Beijing Conference was significant in locating gender equality in the international discussion on development. A key objective of the Beijing Conference was to '[e]liminate trafficking in women and assist victims of violence due to prostitution and trafficking'.²⁷⁵

The Beijing Conference provides for a detailed due diligence standard for States to ensure the elimination of violence against women this includes: draft laws, prosecute perpetrators of violence against women, monitor the implementation of legislation, protect women, prevent violence against women, put remedies in place.²⁷⁶

²⁶⁹ World Conference on Human Rights op cit note 268 at art 18.

²⁷⁰ Ibid at art 40.

²⁷¹ UN General Assembly 'Declaration on the Elimination of Violence against Women' 20 December 1993 A/RES/48/104 available at <https://www.refworld.org/docid/3b00f25d2c.html>, accessed 14 October 2019.

²⁷² Supra at art 1, 2, 3, 4.

²⁷³ Supra at art 3, 4.

²⁷⁴ United Nations 'Beijing Declaration and Platform for Action' adopted at the Fourth World Conference on Women 27 October 1995 available at <https://www.refworld.org/docid/3dde04324.html> accessed 14 October 2019.

²⁷⁵ Supra at art 130.

²⁷⁶ Supra at art 124.

The Rome Statute of the International Criminal Court (The Rome Statute)²⁷⁷

The Rome Statute established the International Criminal Court (ICC) which sits in The Hague, The Netherlands. It stipulates that ‘the most serious crimes of concern to the international community’ namely, crimes of genocide, crimes against humanity, war crimes and crimes of aggression are under the jurisdiction of the ICC. These crimes are defined extensively in the statute which locates enslavement as a crime against humanity.²⁷⁸

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;²⁷⁹

The Rome Statute defines slavery in the context of trafficking in persons and lists it as a crime against humanity.

The 10 Year SADC Strategic Plan of Action on Combating TIP (2009-2019), Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children and the Economic Community of West African States’ Declaration on the Fight against Trafficking in Persons complete the regional soft law that assisted in wider domestication of the Palermo Protocol.

The treaties above enshrine human rights. The Rome Statute is different and instead addresses criminal responsibility with a focus on prosecuting and holding to account at an international level those who commit serious crimes.

4.3 Conclusion

The ratification of international and regional treaties and conventions by States Parties means that they commit to respect, protect and fulfil the positive and negative rights enshrined in the instruments. It also places specific obligations on States Parties to consequently domesticate the treaties and apply due diligence to ensure that rights violations do not occur. This chapter has therefore outlined international and regional instruments and their relevance to trafficking in persons.

²⁷⁷ UN General Assembly ‘Rome Statute of the International Criminal Court (last amended 2010)’ 17 July 1998 ISBN No. 92-9227-227-6 available at <https://www.refworld.org/docid/3ae6b3a84.html>, accessed 14 October 2019.

²⁷⁸ Supra at art 7 (1) (c).

²⁷⁹ Supra at art 2c.

CHAPTER 5 SOUTH AFRICAN LEGISLATIVE FRAMEWORK

This chapter focusses on the South African legislative framework and identifies the laws, regulations and policies that are relevant to trafficking in persons. It explores policy taking into account the state obligations for both positive and negative measures. It will also consider SA jurisprudence on human trafficking.

5.1 National Legislation

The Constitution of South Africa 1996 (The Constitution)²⁸⁰

The Constitution is the ‘supreme law of the Republic’, it includes a Bill of Rights which makes provision for the following non-derogable rights. The right to non-discrimination, equality and equality before the law, human dignity, freedom and security of person, to not be subjected to slavery, servitude and forced labour and children’s rights, including protection from ‘maltreatment, neglect, abuse or degradation’ and ‘exploitative labour practices’.²⁸¹ The Constitution guarantees these rights and freedoms to all.

The Constitution, describes the way life in South Africa should be experienced, that everyone be treated equally and with dignity, where everyone is safe and protected. It provides for freedom from servitude, slavery or labour exploitation and for child rights and ‘the best interests of the child are of paramount importance’.²⁸² Chapters two and three of this thesis illuminates the lived realities in South Africa and how conditions of poverty and inequality result in human rights violations and in effect constitutional violations.

During the period that South Africa was drafting the anti-trafficking legislation, anti-trafficking law provisions were incorporated into other statutes to ensure that SA upheld its international obligations in the interim. The Children’s Act 38 of 2005 and the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 were thus amended to criminalise trafficking until the PCTP Act would be promulgated.

Prevention of Organised Crime Act (POCA)²⁸³

POCA is focussed on racketeering and proceeds of unlawful activities. It encompasses money laundering, assisting with or benefiting from unlawful activities, acquisition, possession or use and failure to report suspicion of unlawful and criminalising gang activities. It contains

²⁸⁰ Constitution of the Republic of South Africa 1996.

²⁸¹ Supra note 280 at chap 1 s2, chapter 2 ss 9, 10, 12, 13, 28, 28 (1)(d), 28(1)(e).

²⁸² Supra note 280 at s2.

²⁸³ Prevention of Organised Crime Act 121 of 1998.

prescripts for civil forfeiture of the criminal assets.²⁸⁴ Trafficking in persons and transnational crime is not mentioned in the act although, domestic and transnational, trafficking in persons, are crimes committed by organised crime.

Prevention and Combating of Trafficking in Persons Act²⁸⁵

The PCTP makes provision for the ‘status of foreign trafficked persons required to assist in investigations and prosecutions’. It sets out that they may receive a visitor’s visa and if they are unable to assist an assessment of their safety must be made before repatriation.²⁸⁶

The PCTP makes provision for the identification and protection of trafficked persons. Anyone who suspects that a child is trafficked must report it, even if they are under oath for non-disclosure. They should not be disciplined for so doing. It is only in the case of lawyer-client confidentiality where upholding confidentiality is accepted. The police must respond immediately to such report and may act without a warrant and use reasonable force to remove a child. The police, guided by the Children’s Act, must ensure the rescued child’s safety and care and refer the child to social workers.²⁸⁷

If an accredited organisation, or a person bound by a non-disclosure clause identifies an adult as a possible victim of trafficking they must report it to the police. Anyone else that suspects an adult as a victim of trafficking is not compelled to report. The police should act to ensure the safety of the person including remove them from their location, assist with access to medical care and drive them to ‘temporary safe care or an accredited organisation’.²⁸⁸ A social worker should do a full assessment to establish if the person was in fact trafficked. A ‘letter of recognition’ is issued by the provincial social development once they have ascertained that said person was indeed trafficked.²⁸⁹

The PCTP provides for foreign trafficking victims to access health care services; for the victim to not be prosecuted if they committed a crime due to the trafficking situation.²⁹⁰ ‘Unauthorised access to and disclosure of information’ is stipulated as an offence.²⁹¹

The PCTP makes provision for the accreditation of organisations to provide services to adult victims of trafficking as prescribed by the Minister of Social Development. This should include a ‘system for accreditation’, how the organisations will be accredited, the nature of

²⁸⁴ *POCA* supra note 284 at ch3 ss4, 5, 6, 7, 9.

²⁸⁵ *PCTP* supra note 7.

²⁸⁶ Supra at s15, 16, 17.

²⁸⁷ Supra at s18.

²⁸⁸ Supra at s19 (7).

²⁸⁹ Supra at s19.

²⁹⁰ Supra at ss 21, 22.

²⁹¹ Supra at s23.

their programmes, how their programmes will be monitored and evaluated, ‘norms and minimum standards’ to be adhered to, and removal of organisations. Additional standards are required from organisations that also accommodate a child who is with an adult trafficking victim, to ensure their safety and wellbeing.²⁹²

The PCTP also provides for programmes to entail ‘accommodation... counselling... reintegration’ and may include ‘rehabilitation and therapeutic services... or education and skills development training’.²⁹³

Provisions are made for the organisation to develop a plan for the victim encompassing ‘immediate and reasonable future needs’ as well as an ‘exit plan’ and for men and women to be kept in separate facilities.²⁹⁴

In addition, the PCTP stipulates that organisations must gather information from trafficked persons comprising how they were recruited, where they were trafficked to and from, routes taken, transport used and what travel documents were used and how they were procured, methods used to subjugate victims and keep them in the exploitative scenario. This information and the numbers of national and foreign victims are to be collated into an annual report for submission to the Department of Social Development (DSD) Director-General (DG).²⁹⁵

It provides for a victim to be paid compensation for physical and psychological suffering. The court may instruct the guilty party to pay compensation in addition to their sentence, alternatively the victim can make a civil action claim. The court may impose an order for payment to the state to cover costs in respect of care, accommodation, transport, repatriation for the victim, ‘by the convicted person or the carrier’ that transported the victim.²⁹⁶

The PCTP provides for the return and repatriation of victims of trafficking whether domestic or foreign. Safety is the primary concern at all times, no-one should be returned if they will not be safe and if their support has not been confirmed.²⁹⁷ The DSD DG is responsible for processes involving children and the Department of Home Affairs (DHA) DG for adults.

The PCTP makes provision for the ‘best interests of the child’, proper child care and the safety of the child during the return process and in the country they will return to and the ‘possibility that the child might be harmed or killed’ must be weighed in deciding to repatriate

²⁹² *PCTP* supra note 7 at s24, s25.

²⁹³ *Supra* at s26.

²⁹⁴ *Supra* at s28.

²⁹⁵ *Supra* at s25.

²⁹⁶ *Supra* at s29, s30.

²⁹⁷ *Supra* at s31, s32, s33, s34.

them.²⁹⁸ Children should be escorted home under authority of the DG, either by the parental responsibilities and rights holder or by a mandated adult.²⁹⁹

Provision is made for the Children's Court to 'suspend all the parental rights of that parent or guardian or other person' suspected of trafficking of a child in their care, they may also be charged for this offence. The Children's Court should place the child in 'temporary safe care'.³⁰⁰

The PCTP provides for DHA to assist with the verification of travel documents in matters dealing with trafficking in persons.³⁰¹

The PCTP provides for the administration of the act and the drafting of a national policy framework (NPF). The Minister of Justice and Correctional Services (Justice) must approve the national policy framework in consultation with specified Ministers, to ensure coordination and cooperation; 'guide the implementation and administration'; 'enhance service delivery... development of a plan' and should report to parliament on an annual basis.³⁰² It stipulates the regulations and directives to be issued by the Ministers of Justice, DSD and DHA.³⁰³

5.1.1 Strengths

The ways in which anti-trafficking legislation in South Africa protects trafficked persons, promotes the human rights of victims of trafficking, prevents human trafficking and prosecutes perpetrators are emphasised below together with identified shortcomings of the PCTP.

The law promotes the human rights of trafficked persons and prevents human trafficking by putting in place both positive and negative measures to combat human trafficking starting with the domestication of the Palermo Protocol. It puts in place a system to meet the needs of a trafficked person. Its provisions for the NPF, regulations and directives incorporate training of staff in the criminal justice system and public awareness raising programmes to reduce the number of people being recruited into trafficking.

The law is protecting victims in the following ways. The legislation itself establishes trafficking as an offence as discussed in chapter two of this thesis and enables the prosecution of the traffickers.

²⁹⁸ *PCTP* supra note 7 at s 31.

²⁹⁹ *Supra* at s35.

³⁰⁰ *Supra* at s36.

³⁰¹ *Supra* at s38.

³⁰² *Supra* at s40.

³⁰³ *Supra* at s43, s44.

The PCTP empowers South African Police Service (SAPS) to prioritise human trafficking cases and to act swiftly to remove a person thought to be trafficked from the situation they are in, even without a warrant and with the use of reasonable force to rescue a trafficked person. In so doing, the rescue and safety of the trafficked victim is prioritised. Trafficking in persons is convoluted and thus hard to investigate thoroughly without sufficient resources, this need is acknowledged in the law. Prioritising of a trafficking case by police upon receiving the report is positive. Does this priority status get carried through the entire criminal justice system from investigations all the way to the courts to ensure that trials are not protracted?

The legislation is clear that victims of trafficking may not be prosecuted, where they may have been involved in a crime in the context of the trafficking experience. This is important for ensuring the right to access justice. However, the criminalisation of prostitution makes it difficult for an investigator to distinguish between prostitution and trafficking for sexual exploitation purposes as well as determine who is guilty or not, this is a matter that requires more careful consideration.

The specifications of 'factors widely considered' in sentencing and the provision for compensation to be paid to the victim, supports the need for strong judgments and eliminates showing leniency to perpetrators whose actions have far-reaching consequences on the victims.

Protection of victims is aided by a number of provisions including those emphasising victim identification; safe keeping; accredited organisations; programmes for victim support and assistance. In addition, the prioritising of the victim's safety and assessment by social workers and psychologists to ensure that their needs are addressed and a plan is developed.

Migrants or foreign nationals who have been trafficked are given fair and just consideration as their safety and the prosecution of the accused is prioritised above instant deportation. Provisions are now in place for them to receive documentation as a priority and facilitation of contact with their family to ensure that they only return home under safe conditions. They are also entitled to the support available to other trafficked persons whilst remaining in the country. In the past deportation of migrants without due consideration of the fact that they were a witness, weakened the prosecution's case as they were left without a witness. In addition, some of the victims were returned to environments that were unsuitable for them to recover from the trafficking ordeal.

The law takes into account the consequences of trafficking on its victims through provisions for: comprehensive programmes of accredited organisations including accommodation, prioritising safety; healthcare services for physical and psychological

wellbeing. It displays sensitivity in addressing return and repatriation needs of victims so that they are able to return to a safe and supportive family environment. It makes provision for an adult with a child which is important for young mothers to be supported and to keep children and their parents together.

5.1.2 Shortcomings

The Constitution makes limited provision for redressing land dispossession including limitation clauses for land claims.³⁰⁴ Reparations and compensation for the descendants of indigenous, enslaved or colonised peoples and those persecuted under apartheid is not mentioned. Social and economic rights are enshrined as attainable through ‘progressive realisation’.³⁰⁵ These are particularly significant when we consider that full realisation of all rights and the return of all stolen lands and wealth would alleviate much of the widespread poverty which makes many people vulnerable to trafficking. Proponents of neo-apartheid constitutionalism argue that South Africa is an ‘anti-black bifurcated’ society that confines ‘the majority of black people in a zone of non-beings’.³⁰⁶ This preserves the work of colonialism, the theft of the land and mineral wealth and the suppression of the humanity of the majority, thus sustaining the desperation of poverty and the wealth of the colonisers and elitist blacks.³⁰⁷

Judgments could apply the full might of the law. Given that human trafficking is a complex crime, judgments err in neglecting to rule on the causes of trafficking in persons. The law is not addressing the neoliberal standards and norms, codes of conduct and rules and regulations, which encourage deregulation and labour exploitation resulting in increased poverty. Judgments could include a ruling on reparations and compensation for the victim and spare them from navigating a second process.

The use of ‘soft’ language with regard to education, and the requirement that training is optional is disappointing. It is unclear what criteria to apply to determine when it would be necessary and acceptable to offer education and training. This is significant because the affected people will need to have marketable skills and basic education to access a job and provide for themselves. In addition, drug addiction is not given any specific mention although it is a problem faced by many trafficked victims.

³⁰⁴ *Constitution* supra note 280 at s25.

³⁰⁵ *Supra* at s26, s27.

³⁰⁶ Tshepo Madlingozi ‘Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution’ (2017) 1 *Stell LR* 123 at. 138

³⁰⁷ *Ibid.*

5.2 Regulations

The Minister of Justice and Correctional Services, under PCTP section 43(1)(a) made the regulations in the Schedule.³⁰⁸ Regulations for Prosecutor's referral of suspected victims of trafficking in persons, which provides for the prosecutor to refer an adult or child they have reason to believe was trafficked to the DSD.

DSD Minister under PCTP section 43(3) made the regulations in the Schedule. Regulations for DSD stipulates that in the case where it appears a child has been trafficked. The designated social worker should assess, investigate and report to the Children's Court on a child victim's situation and their family situation within 90 days. The Children's Court will rule on the child's 'care and protection' needs. In the case of a suspected adult victim, the social worker should assess the situation and provide the victim with a 'letter of recognition' issued by the Member of the Executive Council in the province (MEC). Only the MEC can withdraw the letter and hear appeals, based on regulatory provisions.³⁰⁹ Provincial DSD should refer a victim of trafficking who is an 'illegal foreigner' to the DHA.³¹⁰

The regulations provide for the accreditation of organisations to provide services to adult victims of trafficking. If the adult has a child, a program for reception, care and development for the child is required. These organisations must comply with the norms and minimum standards set out in the regulations.³¹¹ Stipulated guidelines must be followed to ensure the protection and support of suspected trafficking victims. The requirements for accredited organisations providing victim support and services are outlined. This includes accommodation, counselling, rehabilitation and therapy, reintegration with family and community, education and skills development training, medical and healthcare, a safe and protective environment.

5.3 Prevention and Combating of Trafficking in Persons National Policy Framework (NPF)³¹²

The NPF gives effect to the PCTP and maps out South Africa's strategy with strategic goals, objectives and priorities and an anti-trafficking action plan for implementing and monitoring the integrated management of TIP offences and work.³¹³

³⁰⁸ PCTP Regulations in GN737 GG39119 of 21 August 2015.

³⁰⁹ PCTP Regulations in GN1006 GG39318 of 23 October 2015 at 6, 7.

³¹⁰ Supra at 10.

³¹¹ Supra at 11.

³¹² Prevention and Combating of Trafficking in Persons National Policy Framework hereinafter referred to as "NPF" <http://www.justice.gov.za/vg/TIP.html>, accessed 14 June 2019.

³¹³ PCPT supra note 7 at ss40, 41.

The NPF was drafted after the SAPS National Commissioner, National Director of Public Prosecutions, Chief Executive Officer of the Government Communication and Information System (GCIS), Commissioner of the South African Revenue Service (SARS) and the Directors-General: Health, Home Affairs, International Relations and Cooperation, Labour, Social Development, State Security Agency and Women were consulted.³¹⁴

The NPF places emphasis on a human rights and victim-centred approach, including best interests of the child determination. Engagement by multiple stakeholders with specialised skills from civil society and government on both national and international levels.

The structure of the NPF is delineated in the national anti-trafficking strategy and the national anti-trafficking action plan; the former has nine clear strategic objectives and the latter is a three-year inter-departmental implementation plan.³¹⁵

The NPF maps out the coordination structures, the National Anti-Trafficking Coordinator (NC) is appointed by the Minister and may be the Chief Director of Justice and Constitutional Development or their nominee. The NC will ‘coordinate, monitor and report’ on the NPF and is supported by a secretariat, and leads the National Inter-sectoral Committee on Trafficking in Persons (NICTIP).³¹⁶

The NICTIP comprises of a few state departments and institutions namely Department of Justice and Constitutional Development (DOJCD), DSD, DHA, Department of International Relations and Cooperation and Departments of Labour, Health, Women, State Security, Finance, Performance, Monitoring and Evaluation, National Prosecuting Authority of South Africa, SAPS, GCIS, SARS, NGO representatives appointed by DSD. NICTIP is responsible for the ‘design, coordination and implementation of the NPF’.³¹⁷ The National Rapid Response Team (NRRT) is the frontline response nationally to ensure that there is always an inter-sectoral, cross disciplinary team in place to handle trafficking cases. This structure is similarly replicated in each province through the establishment of Provincial Task Teams (PTTs) and Provincial Rapid Response Teams (PRRTs). The duties of each entity are set out in the NPF.³¹⁸ The majority of the national and provincial coordination structures have been established, the NC and NRRT are not yet in place.

³¹⁴ *NPF* supra note 312 at 11.

³¹⁵ *Supra*.

³¹⁶ *Supra* at 24.

³¹⁷ *Supra* at 13.

³¹⁸ *Supra* at 27, 28.

The anti-trafficking strategy has ‘four pillars’ for an effective response, prevention, protection, prosecution and partnership.³¹⁹ The partnership is further delineated into national and international cooperation and coordination.

The national partnerships pillar recognises that the complexity of the crime requires efficacious coordination and cooperation of various stakeholders, from state and civil society, across sectors. Standardised procedures and resources, guided by a comprehensive legal and regulatory framework are encompassed.³²⁰ These are all set out in the strategy as well as the need for consistent and regular ‘monitoring, evaluation and review’ to ensure that the responses are adjusted as necessary.³²¹

The PCTP and the NPF are complemented by Regulations and Directives. The regulations as stipulated in the PCTP have been made by the DOJCD and DSD, regulations by DHA remain outstanding.

The prevention pillar firstly, aims to raise the public’s awareness of human trafficking to discourage ‘the demand and supply of cheap labour that foster trafficking and exploitation of vulnerable individuals, especially women and children’.³²² This will include programmes on ‘harmful traditional practices’.³²³ Secondly, the reduction of the vulnerability of certain groups to being trafficked and re-trafficked by ‘counteracting discrimination, marginalisation and social exclusion’; and improvement of social and economic conditions which cause trafficking.³²⁴ Research is identified as imperative to obtain accurate quantitative and qualitative information about human trafficking and to ensure that anti-trafficking policy and strategy remains relevant.

The protection and victim assistance pillar is integral to a successful counter-trafficking programme arranged into four strategic goals identification; assistance, protection and social inclusion; access to civil procedures, witness protection and compensation; and return and repatriation. The pursuit of these goals should result in amongst others: potential trafficked persons being recognised; trafficked persons being identified; victims receiving monetary reparations; victims having access to long-term assistance programmes.³²⁵

The central focus of the prosecution pillar is improved investigations and prosecutions. Key action points are increase in training officials in the criminal justice system on trafficking;

³¹⁹ *NPF* supra note 312 at 30.

³²⁰ *Supra* at 32.

³²¹ *Supra* at 36.

³²² *Supra* at 39.

³²³ *Supra* at 39.

³²⁴ *Supra* at 39.

³²⁵ *Supra* at 44.

greater cooperation between investigators and prosecutors; dedicated focus on labour exploitation.³²⁶ Human trafficking is about profits, thus the confiscation and seizure of assets and proceeds of crime is integral in eradicating this crime.³²⁷ The elimination of corruption, as a ‘contributing factor’ is also identified as critical.³²⁸ Investigations are required to go beyond the individual accused to find the ‘organised crime groups’ controlling the trafficking.³²⁹

The international partnerships pillar aims to meet state obligations in bi-lateral treaties and the UNTOC, achieve international cooperation in criminal matters and ‘increase cooperation with other States to counter-TIP’.³³⁰

The NPF is a broad strategic plan for implementation of the legislation, incorporating national and provincial structures, strategic objectives and goals and an implementation action plan. It has identified vulnerable people including ‘women, children, undocumented migrants, LGBTI people, people with disabilities’.³³¹ The emphasis placed on prevention, protection and prosecution in this plan is positive.

The NPF takes a limited view of international instruments and has not considered soft law.

It is affirming to see NPF includes the need to reduce school drop-outs, economic empowerment for women and social protections to reduce people’s vulnerability to trafficking. It is unclear how these goals will be accomplished in the current economic recession. Unemployment is rapidly increasing and even state-owned enterprises are threatening job losses and closure. Without addressing the root causes and structural inequality which includes the economic system that is failing the poor, it is unclear how social and economic rights will be attained.

The NPF was finalised in April 2019, it definitely validates many of the concerns raised in this thesis. The execution thereof will illustrate the political will and commitment to end human trafficking.

³²⁶ *NPF* supra note 312 at 47, 48.

³²⁷ *Supra* at 48.

³²⁸ *Supra* at 49.

³²⁹ *Supra* at 47.

³³⁰ *Supra* at 50.

³³¹ *Supra* at 38.

5.4 Directives

The DG of Justice and Constitutional Development issued the directives in the Schedule in terms of section 44(1)(a) of the PCTP in consultation with the relevant departments and state agencies.³³²

The directives aim to ensure the integrity of the investigation and stipulate reporting procedures for human trafficking cases, measures for situations with victims of trafficking who are foreign and unable to speak a local language and the measures needed for victim and witness safety in human trafficking cases.³³³

The victim-centred approach as outlined in the Service Charter for Victims of Crime in South Africa, the Minimum Standards on Services for Victims of Crime and the National Policy Guidelines for Victim Empowerment should be used in the application of the law, regulations and directives. The directives require that identified vulnerable groups be treated with sensitivity: ‘women, persons with disabilities, persons with albinism and persons with a specific sexual orientation’.³³⁴

Procedures for the confidentiality of the investigation and personal information of those involved is secured through stringent confidentiality provisions. Documents must be marked “restricted” or “confidential” kept ‘under lock and key’ and password protected, ‘unauthorised access and disclosure is a crime’ as stipulated in PCTP s23.³³⁵

5.5 Case Law

South African courts have had limited opportunities to apply anti-human trafficking laws, be they through the transitional clauses in the Sexual Offences Act, the Children’s Act or the recently enforced PCTP. Forty per cent of countries with dedicated laws did not record a single conviction for trafficking in persons from 2003 to 2008, and most of those that have applied the law have registered relatively few convictions, this is a sobering statistic.³³⁶ This section highlights two recent cases. The first is a landmark case about forced marriage and child trafficking, the second is cross-border trafficking for purposes of sexual exploitation. The second case stems from a stranger befriending three young women and although no distinct organised criminal network is uncovered, the judge notes that the operation must be much more extensive than what has been revealed in the case.

³³² Prevention and Combating of Trafficking in Persons Act Directives in terms of section 44(1)(a) available at <http://www.justice.gov.za/vg/TIP.html>, accessed on 14 June 2019.

³³³ Supra at 2.

³³⁴ Supra at 3.

³³⁵ Supra at 4.

³³⁶ Allais op cit note 88 at 43.

Jezile v S and Others 2016 (2) SA 62 (WCC)³³⁷

The appeal case of *Jezile v S and Others* may have been the most important action to secure the safety of young girls in South Africa in 2015. As outlined in chapter two and three, children and women are the two, high risk vulnerable groups, which using an intersectional lens makes young girls most vulnerable. This case goes to the heart of one of the practices that affects young women directly; human trafficking for forced marriage for purposes of exploitation. Furthermore, *ukuthwala* or forced marriage is not commonly understood as having any relation to human trafficking, it is justified as traditional and cultural ways of doing and living. This case thus gives life to the clauses 4(1)(c) and (h) and 4(2)(b) of the PCTP Act.

In *Jezile v S and Others* the full panel of judges in the appeal court considered and applied the opinion of seven amici curiae. They comprised two chapter nine institutions and non-profit organisations specialising in public interest law, women, children and rural and traditional issues. The trial was first held in Wynberg Regional Court, the appeal was lodged in the Western Cape High Court.

The appellant, a 28-year-old man was found guilty of human trafficking, rape and assault with intent to do grievous bodily harm. He appealed against the verdict and sentence. The appellant, married a 14-year-old girl, a Grade 7 learner, in a customary marriage through the practice of *ukuthwala*.³³⁸ *Ukuthwala* involves the abduction of a girl by a man who wishes to marry her, she is taken to his family home. Permission for the marriage is requested from the girl's family who often agree.

The appellant argued that the question of consent was not significant as coercion is a feature of *ukuthwala*, justified by the notion that the woman must object so that she appears modest. He also argued that *ukuthwala* is a custom and traditional practice and thus protected under the South African Constitution.³³⁹

If the court did not uphold his appeal, the appellant argued that separate charges for rape and assault was 'splitting of charges' as it was the same instance when he was forcing the victim to have sexual intercourse.

The appellant appealed believing that the magistrate erred in not fully considering that they were in a customary marriage which he believed was protected by the Constitution.

³³⁷ *Jezile* supra note 17.

³³⁸ Supra at paras 5, 6.

³³⁹ Supra at para 52.

In the Appeal Court these arguments were highlighted by the appellant. He appealed the charges of trafficking and rape arguing that he was in a customary marriage and the magistrate did not see that as relevant which ‘amounted to a misdirection’.³⁴⁰

In appealing the convictions, the appellant put forward that the trial court failed to consider ‘the rightful place which customary law has in our constitutional dispensation’ particularly since bride’s consent in *ukuthwala* is irrelevant.³⁴¹

The seven amici curiae made representation to help the court to consider the question of the customary marriage rights, the cultural practice of *ukuthwala*, and the rights enshrined in the constitution especially the rights of women and children.

The court considered the legal framework and applied S 211(3) of the Constitution which requires the consideration of customary law, legislation and constitutional provisions.³⁴² The court also considered S 39 of the Constitution, which directs ‘interpretation of the Bill of Rights’.³⁴³ The court took into account

S 28(1)(d) [in the Bill of Rights] stipulates that every child has the right to be protected from maltreatment, neglect, abuse or degradation; and s 28(2) that a child’s best interests are of paramount importance in every matter concerning the child. A child is defined in s 28(3) as a person under the age of 18 years.³⁴⁴

The court further interpreted provisions in the Sexual Offences Act including S 3, S56(1), 56 (8), Part 6 (ss 70-72).³⁴⁵ The Recognition of Customary Marriages Act 120 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, UDHR, CEDAW, Palermo Protocol, Maputo Protocol, CRC, ACRWC, OPSC, The Addis Ababa Declaration on Ending Child Marriage in Africa.³⁴⁶

The extensive legal framework taken together with the testimony of the amici curiae led the bench to conclude that

child trafficking, and any form of child abuse or exploitation for sexual purposes, is not to be tolerated in our constitutional dispensation.³⁴⁷

it cannot be countenanced that the practices associated with the aberrant form of *ukuthwala* could secure protection under our law.³⁴⁸

³⁴⁰ *Jezile* supra note 17 at para 51.

³⁴¹ Supra note at para 52.

³⁴² Supra note at para 58.

³⁴³ Supra note at para 60.

³⁴⁴ Supra note at para 59.

³⁴⁵ Supra note at para 63.

³⁴⁶ Supra note at paras 65, 67, 68.

³⁴⁷ Supra note at para 69.

³⁴⁸ *Jezile* supra note 17 at para 95.

We can furthermore find no fault with the trial court's credibility findings, nor with its reasoning and conclusions in respect of the convictions on both the trafficking and rape counts.³⁴⁹

Jezile appealed against his sentence and conviction on one count of human trafficking and three counts of rape. The appeal court upheld the ruling, convictions and sentences of the regional court.³⁵⁰

This is a landmark case as it is the first *ukuthwala* case, and also the first case about child marriage and forced marriage. The rulings support the definition of trafficking in South African law, that neither a child nor a person with authority over a child can consent to trafficking and that an abuse of vulnerability can be a means of trafficking.

This ruling protects the integrity of customary law marriages by recognising what happened between the complainant and appellant as an 'aberrant form of *ukuthwala*'. In so doing it protects not only this complainant but many other young women who are vulnerable and potential victims of this type of human trafficking abuse and exploitation. The judgment thus contributes to the jurisprudence on child trafficking, forced marriage, child marriage and marriage by customary law.

This ruling is important because it challenges patriarchal socio-cultural norms which limit the opportunities for growth and empowerment of girls and women. Patriarchy and the desperation of poverty are significant causes of child and forced marriage which has severe consequences not limited to creating a vicious cycle that keeps women impoverished.

The verdict included placing the appellant's name on the National register for Sexual Offenders. This ruling is an illustration of the state upholding its obligations as set out in CRC articles 24 and 35. In only ruling that an 'aberrant form of *ukuthwala*' equates to human trafficking the court is silent on *ukuthwala* as a practice even though it includes abduction. The judgment does not address the criminal acts of the relatives involved, the victim's uncle, the appellant's brother as two examples. Jezile is found guilty but the court described the actions of the relatives as 'nothing more than a neutral factor insofar as the appellant's own blameworthiness was concerned'. Jezile's brother, who held the victim down while he raped her and thus an accomplice in this crime was also not prosecuted.

Dos Santos v S 2018 (1) SACR 20 (GP)³⁵¹

³⁴⁹ Supra note at para 96.

³⁵⁰ Supra note at para 106.

³⁵¹ *Dos Santos v S* 2018 (1) SACR 20 (GP).

Dos Santos was the first human trafficker to receive a life sentence.³⁵² This case depicts cross border trafficking for purposes of sexual exploitation where the perpetrators have lured vulnerable people experiencing the desperation of poverty into a trap. The judge notes that whilst the case is about one story, it appears to be part of a much more extensive operation than what has been revealed. The courts are steadfast in applying the anti-trafficking legislation and addresses the peculiarities of trafficking in persons.

The appellant, was sentenced in the regional court to life imprisonment in 2011. She was convicted on three counts of trafficking in persons for sexual purposes and one count of living from the earnings of sexual exploitation of a child. Her convictions were taken together for purposes of sentence. This appeal is against the imposed life sentence.³⁵³ On appeal the Pretoria High Court upheld the sentence of life imprisonment in 2017.

The appellant appealed against the life sentence, the issue was whether the sentence was proportionate to the crime.

PCTP Act article 14 lists aggravating factors to be considered in imposing the sentence.

The appellant challenged the correctness of the imposition of the sentence of life imprisonment. She submitted that the regional magistrate erred by taking into account the commission of the rapes stated in the charge-sheet, as if the appellant had been convicted of those crimes, while she had been acquitted in that respect. It was proposed by counsel for the appellant that the alleged rapes should not be taken into account for purposes of sentence.³⁵⁴

The appellate court judge stated that the sentence was not related to committing rape and therefore the grounds for appeal is not a salient argument. The court considered the possible aggravating circumstances. The appellant was found guilty for having harboured the complainants and for trafficking them for sexual purposes as set out in s70(2)(b) of the Sexual Offences Act. She threatened them by keeping their documents and threatening to hand them over to home affairs for ‘prosecution as illegal immigrants’, their vulnerability was exploited and they were exploited for profits.³⁵⁵

The magistrate found evidence that an ‘elaborate and organised criminal enterprise’ operated to transport the young women across the border from Mozambique to South Africa. This implied that there are more undetected cases.³⁵⁶

³⁵² Frankel op cit note 12 at 63.

³⁵³ United Nations Office on Drugs and Crime Dos Santos case available at https://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/zaf/2017/case_a262014.html?lng=en&tmpl=htms, accessed on 14 June 2019.

³⁵⁴ *Dos Santos* supra note 351 at para 8.

³⁵⁵ *Supra* at para 9.

³⁵⁶ *Dos Santos* supra note 351 at para 11.

The regional court applied the minimum sentence of life imprisonment on the appellant since there were no mitigating circumstances to support a lesser sentence.³⁵⁷

Dos Santos appealed the sentence of life imprisonment for 3 counts of trafficking in persons for sexual purposes, in the belief that whilst she had been found not guilty of rape, the court took the rape of the young women into account in the sentencing. The appeal was dismissed and the life sentence imposed for trafficking in persons for sexual purposes was confirmed.

This case is significant as it addresses the peculiarities of trafficking in persons and the sentencing demonstrates a strong application in the law. The court recognised the deception, force, threats of force and prosecution as illegal immigrants that took place; the lack of freedom of movement, bad living and working conditions and that the victims were forced to use cannabis and lived in fear. All of these circumstances and inhumane treatment is common when luring people into exploitative situations. It also recognised the abuse of a position of vulnerability – the desperation of poverty that caused the young women to trust a stranger who promised them the opportunity to study and work and the further vulnerability of having their legal documents withheld. Corruption of state officials is highlighted, particularly in the account of how they crossed the border. A much more organised system of transporting trafficked persons into South Africa from Mozambique is exposed which as Justice Jacobs says ‘the Convention and its protocol aim to address’.³⁵⁸

5.6 Conclusion

The courts reflect an understanding of trafficking as a process of recruitment, harbouring, transporting by force or deceit for the purposes of exploitation. Judgments display an understanding that consent is not a defence for the accused and that trafficked victims may be deceived and manipulated into situations. The abuse of vulnerability, corruption and abuse of power are recognised. This displays that the prosecution element in the fight to end human trafficking is strong. Courts have not been lenient with sentencing and have justified harsh sentences. In sentencing the courts have taken account of the abuse victims experienced whilst being trafficked like sexual abuse of a child, the relationship between the victim and trafficker, lack of health care, being raped, duration of the ordeal, being forced to take drugs and the impact on quality of life and rehabilitation needed. This is in accordance with the PCTP,³⁵⁹

³⁵⁷ Supra at para 12.

³⁵⁸ Supra at para 11.

³⁵⁹ PCTP supra note 7 at chap 2 s14.

which helps to restore the faith of the community in the courts although it is not enough, as too many cases have not been fully investigated.

Judgments neglect to include a distinct ruling that ensures that the victim receives compensation and reparations. In the current context where systems and procedures are still being established it is most likely that victims of trafficking will struggle to access these processes.

It is disappointing to see that the courts have only brought justice to bear on individuals when by definition trafficking involves more than one person. It is unclear why Dos Santos' boyfriend was not charged. It is unknown whether a separate investigation took place to capture the other people involved in the case. Similarly, Jezile's brother who was an accessory to rape and assault was not charged as well as the victim's relatives who facilitated the *ukuthwala* transaction in the first place.

Frankle argues that investigation of human trafficking cases is weak not only are they dealt with slowly, too many are withdrawn due to insufficient evidence.³⁶⁰ Unfortunately, I have not had access to cases which have not guilty verdicts or where investigations were not pursued.

South Africa has domesticated the Palermo Protocol and the Conventions it has ratified are enshrined in the Bill of Rights. This displays a principled commitment by the state to respect the stipulated human rights. The case law presented are two examples of the unspeakable horrors perpetrated by human traffickers and although the judgments are to be commended, everyone involved in these crimes were not charged. The NPF, regulations and directives are therefore welcomed as a strategic implementation plan to fight 'a serious crime and a grave violation of human rights'.³⁶¹

³⁶⁰ Frankel op cit note 12 at 206.

³⁶¹ NPF supra note 312 at 10.

CHAPTER 6 CRITICAL ANALYSIS, RECOMMENDATIONS AND CONCLUSION

A feminist lens using Intersectionality and Standpoint Theory, is applied to inform the critical analysis of the research question, which is discussed in the particular themes of prevention, partnership, protection and prosecution. The discussion highlights, the strengths of the trafficking in persons law and policy in South Africa and thereafter presents the shortcomings and gaps. These are discussed with a focus on addressing the causes and consequences of human trafficking and recommendations are proposed in conclusion.

6.1 Prevention

6.1.1 Strengths

The strengths of the law and policy include the domestication of the Palermo Protocol in alignment with international law and the treaties South Africa signed, a broader definition of trafficking in persons and a strong Bill of Rights. South Africa passed anti-trafficking legislation as recently as 2013, and finalised its National Policy Framework in April 2019 and is thus in an early stage of implementation. The state's response to human trafficking has been slow, considering that it ratified the Palermo Protocol in 2004 and it is a destination, origin and transit country which also has domestic trafficking.

The statute broadens the Palermo Protocol's definition of trafficking in persons in terms of scope of actions, means and purpose of exploitation. The removal of organs was changed to removal of body parts, thus incorporating the peculiarity of *muti*-killing, which later bore relevance in the *Mogaramedi* case that involved genitalia.

Significantly, the statute incorporates the exploitative practice of forced marriage which is often not perceived as trafficking, especially if it is linked to cultural practices like *ukuthwala*. This was subsequently applied in the *Jeziile* case resulting in the aberrant form of *ukuthwala* being outlawed. This set an important precedent which has radical, positive consequences for ending violence against women and girls. This judgment significantly advances the girl-child's struggle against child, early and forced marriage as well as child trafficking.

The Bill of Rights in the SA Constitution is expansive, inclusive of international civil, political, progressive realisation of social and economic rights with a special section dedicated to children's rights. Consequently, it is globally regarded as a constitutional touchstone in popular discourse.

The NPF's prevention strategy addresses the need for education and awareness in communities about what trafficking is and how it occurs. This will reduce the number of people being manipulated and deceived at the recruitment end and at the exploitation end where people buy the services of trafficked persons. However, as long as families are starving and jobs are scarce, traffickers will always have people to recruit with ease, whether to be trafficked or to buy their cheap services or products. The elimination of trafficking requires more than knowledge of how it operates. The socio-economic conditions of the poor needs improvement to give people dignity and agency. This logic is clearly articulated in the NPF's reduction of vulnerability strategic goal although not strongly reflected in the implementation plans.

The NPF includes research on the extent and nature of trafficking in SA, these studies' findings should improve anti-trafficking strategies.

Importantly, the NPF is responsive to the contemporary issues related to vulnerable groups including children, disabled people, women, corruption and xenophobia. The implementation of the plan as an integrated effort intersecting with state programmes to end gender-based violence, xenophobia and other forms of discrimination is necessary and commendable.

6.1.2 Shortcomings

The most significant shortcoming of human trafficking law and policy is that the prevention strategy fails to address the root causes. It neglects to consider how to address inequality, unemployment or poverty. Neither does it address how to eliminate patriarchy, especially in relation to traditional harmful practices beyond education programmes or how social and economic rights will be realised. All of this increases vulnerability. The law and policy thus leaves room for the violation of the human rights of the majority of people in South Africa to largely stay on track. Although the neo-liberal principle of deregulation creates the conditions for debt bondage and labour exploitation to thrive, there is no indication that this will receive any attention at all.

The economic remedies offered to reduce vulnerability are limited and only target one vulnerable group, women. The remedies do not attempt to reduce the inequality gap and poverty of all vulnerable groups and fail to consider structural inequality and economic growth.

The vulnerability of African migrants, including migrant workers, asylum seekers and refugees is not addressed at all. The NPF's reference to the existing state anti-discrimination action plan is insufficient when these programmes are not sufficiently resourced or monitored. The poor treatment of African migrants by state officials along with inefficient administrative

processes contributes to their vulnerability and violates their dignity. In addition, migrant workers remain unprotected and open to exploitation.

6.2 Partnership

6.2.1 Strengths

The NPF and Regulations are extensive, detailed, decisive and mostly unambiguous. They include multi-sectoral teams to lead the four-pronged anti-trafficking strategy and action plan encompassing prosecution and partnership, both domestic and international. The NPF underscores the crucial role that international cooperation plays in ensuring successful prosecution of transnational crime. These provisions allow for systems, structures and resources to be put in place. The provisions offer clear direction and principles for the overall implementation of the strategy. The strategy includes state and civil society with clear prevention and protection strategies, to ensure a stronger more effective anti-trafficking approach. All the relevant Ministers are consulted on the policy framework with the departments being tasked with specific deliverables. Execution of the action plan has very wisely been enabled by incorporating budgeting and resourcing as distinct NPF strategic goals.

6.2.2 Shortcomings

The state's poor service delivery track record is a threat to the implementation of the plan. The NPF does not indicate how departments will be able to take on this additional work successfully. Whilst there is an accountability mechanism in place to parliament, it is unclear how the community will hold the Ministers accountable. The fragmented approach to budgeting is another shortcoming. Each department and state agency will be expected to incorporate anti-trafficking work in their budgets, requiring formidable coordination and cooperation.

6.3 Protection and Victim Assistance

6.3.1 Strengths

The education and training of police, judiciary and public officials is essential for successful identification and prosecution of human trafficking crimes making the NPF's commitment to this encouraging. Numerous cases are not investigated or prosecuted for a wide range of reasons, including the propensity for victim-blaming and widespread corruption that encompasses missing dockets. Furthermore, the inability to recognise cases of human

trafficking due to a lack of understanding and knowledge by public officials including the judiciary and police impacts prosecution.

The policy framework's victim assistance is impressive, focussing on the protection of victims and the prevention of re-trafficking. It incorporates the physical, psychological, legal, economic and social needs of trafficked persons. It is important for the assessment by social workers and psychologists to occur rapidly to ensure that the victim's needs are addressed without delay.

Special regulations address the needs of suspected victims of trafficking and prioritises children as well as children of parents who have been trafficked.

6.3.2 Shortcomings

Reintegration of a trafficking victim, local or international, into their family and community is exceptionally challenging due to stigma, poverty as well as the families' limited knowledge of how to support the person. Trafficked persons often take a long time to speak about their ordeal and are most likely to share their story in segments over time. This can complicate their reintegration process. The proper provision of state services in communities is thus essential for easy access and support.

There is no plan for making communities safe for the return of victims. A better strategy is needed for the short and longer term accommodation of trafficking victims. It is often not safe for many people to return to their family and community as communities are wracked by poverty and inequality, both factors making people vulnerable to trafficking.

Judgments could stipulate the services and support that the victim should gain access to, so that departments and the accredited organisations can be held directly accountable if these are not provided.

Traffickers exploit the great reliance on migrant labour by South Africa and the Southern African region. It makes it easier to capture those migrants with limited resources, who travel seeking work opportunities in SA. Unfortunately, labour exploitation also becomes more acceptable to observers with racist, sexist or xenophobic attitudes. In these cases, those who observe labour exploitation or purchase the products and services will not care even if they knew that someone needed assistance. In addition, with very few jobs in society, more people are tolerant of exploitative working conditions.

6.4 Prosecution

6.4.1 Strengths

It is affirming to have corruption recognised in the NPF as a key element that must be eliminated in the trafficking of persons process. Corruption by public officials and private sector businesses diverts funds for services and development into the pockets of criminals. Very recently a number of inquiries have exposed corruption and maladministration in the South African public and private sectors, although none were specifically related to human trafficking. These inquiries have illuminated the spiderweb of corruption rackets. One of the most significant inquiries in this period is the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State chaired by Deputy Chief Justice Zondo.³⁶² Although it will take a concerted effort by the state to undo the many corruption networks, thankfully the first steps have been taken.

Investigative capacity building is prioritised in the NPF to enable the prosecution of organised crime. In addition, the investigation and prosecution of labour exploitation is identified as a strategic goal in recognition of the enormity of this problem about which little is known and which has gone unaddressed for too long. A conviction for human trafficking for the purposes of labour exploitation remains elusive. The NPF recognised this weakness and has prioritised the investigation and prosecution of trafficking for labour exploitation as a strategic goal within the prosecution strategy.³⁶³

Historically, crimes involving sexual offences placed the onus on the victim, usually a woman, to prove that the crime took place. This approach makes consent debatable and puts the victim on trial. The courts are clear that the argument that someone consented to go with the trafficking recruiter and was thus not coerced, is not a defence. This is important progress for the girl-child and women's access to justice, in particular.

Traffickers prey on the vulnerable in our society, the poor, migrants, women and children. Significantly, the 'abuse of vulnerability' due to age, socio-economic status or poverty is recognised by the courts although they continue to treat it as a single story rather than as a part of the harmful economic system.

Positively, deterrent and retributive justice is applied in the sentencing of traffickers.

³⁶² Commissions Act (8/1947): Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud

in the Public Sector including Organs of State GN105 GG41436 of 9 February 2018.

³⁶³ *NPF* supra note 312 at 48.

6.4.2 Shortcomings

Urban legends abound about people being kidnapped and shoved into vehicles to be trafficked, many people think that trafficking for body parts entails having an unskilled person brutally removing organs in a dirty building with unhygienic conditions. The Netcare case provides evidence that qualified doctors, gainfully employed, performed illegal kidney transplants under pristine conditions in registered hospitals with donors who agreed to the procedure. The NPF fails to have a clear strategy for monitoring these operations to abolish corruption in private and public hospitals.

The majority of trafficking in persons cases have been for purposes of sexual exploitation, in spite of this, there is no judicial voice highlighting the need to decriminalise prostitution. Decriminalisation will necessitate norms and standards for an unregulated industry and thus reduce the exploitation taking place while offering the victims recourse. It would allow police to distinguish what crimes have been committed and also avoid the erroneous prosecution of trafficking victims. The policy is silent on the issue of decriminalisation of prostitution even though this can increase the safety and protection of vulnerable groups.

Trafficked persons experience a wide range of human rights violations in spite of the extensive human rights corpus and international conventions ratified by many states. SA has been signatory to all the relevant conventions listed excepting the CMW. It has been shown that the non-derogable rights in our Constitution are violated not only by traffickers, but also by the state. Social and economic rights remain elusive and the root causes of trafficking remain a gap in the new law and policy.

The consequences of being trafficked for the victim are dire. The domestication of the Palermo Protocol encompasses positive measures for the protection and support of victims although not without shortcomings. The victim-centred response to trafficked persons and the acknowledgement of physical, psychological, livelihoods needs is a positive advancement. The system put in place for their support, return and repatriation is necessary. The recognition of the varied needs of migrants and the system put in place for their support, return and repatriation is encouraging. The response however falls short on education and training provisions which is not mandatory although a victim will need marketable job skills to be employable. The return and repatriation of victims needs a more realistic response.

Given the relative newness of the law and policy, no decisive statements can be made about success although there are distinct positive indicators in respect of the provisions made.

6.5 Recommendations

It is 23 years since South Africa's exemplary constitution was adopted, for the majority the rights it holds remain elusive. It is in the application of positive measures by the state to protect, promote and fulfil human rights that shortcomings are evidenced. The political will to realise these rights, especially the social and economic rights are integral to the successful implementation of the anti-trafficking strategy.

The law needs to become more proactive in reducing the vulnerability of the groups most likely to become trafficking victims. Courts can rule on the provision of social and economic rights such as housing, water, food or healthcare and in this way promote the building of safer communities. Furthermore, access to lighting in public areas, community centres for social recreation, police services, after-school care and the like all contribute to restoring dignity, increasing safety and the reduction of vulnerability in communities. Judgments could also include compensation, victim support and protection in their rulings. It may not be desirable to have state departments reporting to the courts, however, victims were already severely violated and deserve to have the restoration of their rights treated as a priority. This will effectively also increase the return of trafficked persons to their homes.

Patriarchy ensures inequality in social relations, colonisation ensures inequality in geopolitics while global capitalism ensures inequality in economics. In combination the consequence is poverty and increased vulnerability for those who experience multiple oppressive systems. The courts need to rule that poverty creation and inequality are illegal to eradicate the causes of trafficking in persons.

Judgments are informed by the facts put before the court. Magistrates rule on the specificities of the particular case they are hearing based on the evidence presented. Human trafficking is however a complex crime and relatively new in the courts, judgments may thus need to ensure that the law is enforced to the fullest extent and meaning by addressing structural inequality and poverty. The courts need to rule on the high level of inequality fuelled by the impunity afforded corporations. Courts can also rule on the need for improved industry regulation and the decriminalisation of prostitution to eliminate labour exploitation and debt bondage. Professional bodies, industry accreditors, chambers of commerce, business organisations and trade unions need to become more responsible and proactive in the elimination of labour exploitation. The Minister of Justice could compel such proactivity by calling for engagement or plans. DOJCD can also require that a mechanism be established to monitor hospital transplant operations.

Courts are the upper guardian of children and guardians of the constitution but may not be living up to these responsibilities. In honouring the principle of the ‘best interests of the child’ and to reduce the vulnerability of migrant children, courts should rule that all migrant children be documented and given the relevant permits as a priority. Currently if they were to disappear, it is possible that no one would know because many do not even have birth certificates.

Political will is required to improve the treatment of African migrants, asylum seekers and refugees. This includes SA ratifying the CMW treaty and the DHA improving their administrative efficiency and systems, in granting the relevant documents to African migrants, to reduce their vulnerability to human traffickers and labour exploitation.

Social programmes which deter patriarchal thinking and practices should be implemented in schools and communities. Omorodion purported that programmes that empower young and old and address the social power relations that encourage obedience are needed, as it is these relations that are exploited in the trafficking process.³⁶⁴

The global reports with their exceptionally high unsubstantiated figures are unhelpful. The gathering and analysis of quantitative data is essential for clarity on the extent and nature of human trafficking in South Africa.

6.6 Conclusion

This thesis demonstrated that South Africa’s law and policy although promising, is insufficient to deal with the peculiarities of human trafficking. The law needs to address the root causes of trafficking. The anti-trafficking response is designed to be a coordinated multi-sectoral response with a limited focus. It is essential that this response is informed by intersectionality to enable the implementation of broader solutions especially addressing the violation of social and economic rights and the root causes of trafficking.

The improvement of the quality of life of the poor and vulnerable is an enormous task. Poor communities, urban and rural need to become flourishing economic and social environments. It is the desperation of poverty and the burdens of unemployment and inequality coupled with racism, xenophobia and gender discrimination that make people vulnerable to human traffickers and exploitation. These conditions create a vicious cycle as communities lack the resources needed for the return and repatriation of victims of trafficking.

³⁶⁴ Omorodion op cit note 71 at 46.

Political will is integral to ensure the due diligence needed for the protection of people being trafficked, promotion of human rights and the prevention of human trafficking in South Africa.

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